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FEBRUARY 1, 1913.

BY GEORGE FREDERICK RUSH

OF THE CHICAGO BAR

CHICAGO

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PREFACE TO THE SECOND EDITION

Besides the essential procedural steps and pleadings in the general state and federal chancery practice, this edition also shows the numerous changes and reforms effected by the New Federal Equity Rules in force February 1, 1913. Where state statutes or court rules are silent, state courts usually follow the federal practice. Thus, the new federal rules will affect the state practice also, and it becomes important for the student and lawyer to understand these new federal rules.

This second edition follows the plan of the first. In these two hundred pages of text and forms, are gathered the fruits of nearly five hundred decisions. Profitable as the reading of cases always is, no student can be expected to study and digest so many actual cases in the time given to the subject, even in the best law schools. The reading of cases may well be supplemented by a concise text book which explains the successive proceedings and pleadings in a suit, so that what the student may not learn from the reading of cases on procedure, he will find in the text book.

Fair and just procedural rules are an indispensable part of the administration of justice. The courts cannot transact business without such rules. Lawyers are supposed to be familiar with them. The large number of cases reversed for substantial errors of procedure show that this branch of the law should receive its fair amount of attention and study. It is hoped this book will enable the student and the lawyer to gain a ready knowledge of the essentials. In the choice of subjects, in the new arrangement and analyses of subjects, in the new and yet

old classifications, and tables, the author hopes the student and lawyer will find a logical, concise, and simple exposition of chancery procedure. For example, the author's classification of parties is intended to simplify and reconcile all the numerous and confused terms found in the different cases and rules. The author's classification of defenses to actions, new and yet based on accepted classifications, is sufficient also for demurrers, pleas, and answers; the student is thus encouraged to thoroughly master a single classification which will remain of lifelong practical service to him in his profession. The tables are intended to aid the reader in reviewing and memorizing the text. The illustrative forms were carefully selected and formulated with a view to familiarize the student with the chief pleadings used in actual practice.

The author would be ungrateful if he did not here express his gratitude for the kind appreciation of the first edition of this book.

GEORGE FREDERICK RUSH.

JANUARY, 1913.

PREFACE TO THE FIRST EDITION

This little book grew out of a course of lectures delivered for several years at The John Marshall Law School at Chicago. A limited time spent studying two hundred pages of essentials, yields better results than the same time spent on one thousand pages, through which are scattered the same essentials, with eight hundred pages of minor details. For quick mental grasp, students and lawyers prefer the small elementary treatise; for later study and reference, the larger one. No small text book has been published during the last twenty years, and the practice has modernized in many respects. It, therefore, seems a fit time to produce this modest book, which it is hoped, may lighten the labors of students and lawyers.

Its aim is to treat the main features briefly but not less completely than in other works, large or small, and to discuss such matters of procedure as frequently arise, and need to be better understood. The book is designed for the studious lawyer as well as for the student. It sets forth the general chancery procedure, State and Federal. Modern practice in relation to the master's office has received attention. Illustrative forms are set forth to be read in connection with the text.

The United States Supreme Court's equity rules are included for ready reference. State statutes, governing chancery practice, usually provide that matters of practice not therein provided for, shall be "according to the general usage and practice of courts of equity." Thus the equity rules of the Federal Supreme Court, in whole or in part, have been followed by many of the

states, and have found their way into decisions, State and Federal, largely influencing the usage and practice of the state equity courts.

Equity rule 90 of the Supreme Court provides that in cases not covered the then (1842) practice of the High Court of Chancery in England, may furnish a guide so far as may be consistent with local circumstances and conveniences. Therefore, when a question of practice is not settled by the usage and practice of the state, or of the United States, it becomes important to consult the English edition, 1837, of Daniels' or Smith's Chancery Practice, which, together with the general orders made by Lords Cottenham and Langdale (many of which were closely copied in the U. S. Equity Rules), are the best authorities on English practice at the time the United States rules were adopted. (Thomson v. Wooster, 114 U. S. 104, 112; *Evory v. Candee*, 17 Blatchf. 200.)

Barbour's Chancery Practice seems to be based on the old New York chancery rules as well as on Daniel's work, and thus Barbour sets forth more especially the New York State practice.

The writer desires to express his thanks to his friends Walter S. Holden and Edward T. Lee for their valuable suggestions and help.

GEORGE FREDERICK RUSH.

CHICAGO, April 1, 1909.

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EQUITY PLEADING AND PRACTICE

CHAPTER I

Nature of Equity and Common Law Jurisdiction; Stare Decisis; Case Law and Statute Law

§ 1. The ancient rigidity of common law decisions, caused the invention of the equity court. The pronouncements, decisions, of the ancient common-law courts became so arbitrary, fixed, and narrow, were so strictly adhered to by the ancient common law judges, that a large number of frauds and wrongs could not be adequately remedied. The common law judges had come to regard their judicial decisions as establishing the *letter of the principles of law*, instead of being merely different judicial expressions on principles established outside their decisions, and in the common conscience and customs of the people. To remedy the inflexibility of the then common law, the King established himself as a new court of extraordinary powers, which became known as a court of "the King's Conscience," a "Court of Equity;" which concerned itself more about substance, *reason*, than about the letter of decisions, more about the true intent and effect of acts and conduct, than about the form of acts, however disguised as lawful. This new court, while respecting the common law precedents, did not feel bound by them to the extent of withholding the justice demanded by the peculiar facts of any case.

In time this new court, by its body of decisions, developed its own rules and precedents, and there came to be "reports" of equity cases, as there were "reports" of

law cases. These equity precedents, in a measure, have also become somewhat fixed; but the historical origin and purpose of this court, tends to prevent its precedents from falling into the ancient rigidity of the common law. "Circumstances alter cases," is a proverb of true experience. If decisions are regarded as merely actual instances where certain unwritten rules of conduct are applied, if they are regarded as tentative expressions instead of as final expressions, then judicial decisions become an aid, and seldom a hindrance, in the practical administration of justice.

§ 2. **Cases illustrate, but do not absolutely make, the common law.** Principles, fundamentals, of law (of established right conduct, unwritten law), are simple, are few, and are quite fixed; but the expressions, the applications of these fundamental rules, namely decisions, will be as numerous as the cases, and being fallible human expressions, they can not be entirely final or fixed. Lord Mansfield said: "The law does not consist of particular cases, but of general principles, which are illustrated and explained by those cases." This means that though we loosely speak of decisions as constituting the common and equity law, it would be more exact to speak of decisions as only illustrating, applying, interpreting, that law, which really consists of unwritten principles pre-existing and established in the common conscience and usages of the people.

§ 3. **Stare decisis; decisions contain authoritative expressions upon the common and equity law.** The same facts, mean the same cases, and ordinarily should mean the same decisions. Respect for prior decisions, prevents arbitrariness, and compels lawyers and judges to scrutinize the reasoning of prior similar cases. Prior decisions bring before each judge the light, the reasoning, and the learning of preceding ages. Certainty, stability, consistency, in correct decisions, are necessary to

any reliable and just system of law, and therefore "a correct decision should stand and be followed." But judicial expressions are not infallible; and therefore the only fixity there can be in English and American equity and common law decisions, is, that a decision, of a court of last resort, based upon just and sufficient reasons or grounds, should stand as expressing the law to govern like cases, until that decision be modified or enlarged by a later one, to accord with controlling and better reasons.¹

The very method of common and equity law, the liberty of the court to base its decision always upon true reason or principle, and not necessarily upon preceding cases or expressions, makes its decisions all the more certain, reliable, worthy, and authoritative.

"Let a prior correct decision stand and be followed" is what is meant by the doctrine known as "*stare decisis*:" *Stare decisis* makes the "case law," in other words "the common law" and "equity law." Only by "precedents," is the right kind of certainty and responsibility introduced into the administration of our law. "If a former decision is manifestly unjust, it is not law,"² and such a prior decision may be departed from by other judges, who usually point out the error in their opinion. Common and equity law, is "judge-made law," only in the sense that in judicial decisions especially, are to be found the more authoritative discussions and expressions by the judges themselves, upon many of the commonly accepted principles of correct human conduct.

The doctrine of *stare decisis* applies with special force where a line of common law decisions has established certain principles of law as the basic rules of property titles or of contractual obligations. It is evident that a contrary decision, expressing a contrary principle as being the law, would unsettle titles, and impair the obliga-

1—Blackstone 70; Dodge v. Cole, 97 Ill. 361.

2—Blackstone 70; Gillham v. Madison R. R. Co., 49 Ill. 484.

tions of contracts, beyond those in controversy before the court, and would thus have harmful retroactive consequences unless such contrary decision is one which interprets a statute.² If a common law rule of property is to be overruled it should be done by statute. A statute can not be retroactive.

§ 4. Source and basis of common law. A judge does not pretend to create a principle (fundamental rule) of law. It is his official function, by his opinion, to endeavor to show by what *existing principle* of right, a particular set of facts is governed. Our common law, like the *jus gentium* of the Romans, and like the law of other nations, was not, and, upon the whole, cannot be made or unmade, by the enactment or pronouncement of any man, or aggregate of men, however powerful.³ It consists of those principles (fundamentals), and rules of action, applicable to the government and security of persons and of property, which do not rest for their authority upon any statute.⁴ Our common and equity law is an inherent part, and an historic expression, of the life, customs and practices of our people. Courts cannot originate customs or usages, they can only recognize and give expression to such customs. Neither courts nor legislatures enact the common or equity law. It is self-made, and upon the whole, is a free and natural evolution.⁵ In instances where courts

²—*Haskett v. Maxey* 131 Ind. 187.

³—James C. Carter, "Law, Its Origin, Growth and Function."

1-4 Kent 492.

⁴—James C. Carter, "Law, Its Origin, Growth and Function;" George H. Smith, "Elements of Right and Law;" R. Floyd Clarke, "The Science of Law;" W. S. Pattee, "The Essential Nature of Law;" E. L. Campbell, "Science of Law;" Herbert Spencer, "Social Statics," Ed. 1897 pp. 376 to 411.

"True law is right reason conformable to nature, universal, unchangeable, eternal, whose commands urge us to duty, and whose prohibitions restrain us from evil. Whether it enjoins or forbids, the good respect its injunctions, and the wicked treat them with indifference. This law cannot be contradicted by any other law, and is not liable either to derogation or abrogation. Neither the senate nor the people can give us any dispensation for not obeying this universal

have repeatedly adhered to some precedent and outworn custom, which has become unfair as judged by present customs, statutes are occasionally enacted which abrogate or modify such rules of the common law. *Because of its basis upon the true customs, principles, of life and of conduct, and because of its case-method of expression, our common and equity law is always free to re-express itself more correctly in any new case, in order better to accord with truth and reason.* Common and equity law, is the free, unenacted, "unwritten" law, of a free people; it develops itself;⁶ it is a true and natural system of law. It compares with enacted law (statutes or statutory codes, attempting to cover the whole or a large part of the subject of private rights), as *experience and fact* compare with *experiment and belief*. In the one, the existing common conscience and customs, prescribe conduct; in the other, the commandments of a legislature, or other law giver, prescribe conduct. Both case law and statute law are enforced by the state, and hence are called imperative, or positive law; as distinct from other ethical principles or laws, not enforced by courts and state. It is desired here to call the student's attention to the fact that common law or case law, is accepted as law, not by the edict of judge or legislature, but by the common recognition of its justice and reasonableness by other judges; while statute law, is law simply because it is imperatively commanded by the power of the state.

law of justice. It needs no other expositor and interpreter than our own conscience. It is not one thing at Rome and another at Athens; one thing today and another tomorrow; but in all times and nations this universal law must forever reign, eternal and imperishable. It is the sovereign master and emperor of all beings. God Himself is its author, its promulgator, its enforcer.

And he who does not obey it flies from himself, and does violence to the very nature of man. And by so doing he will endure the severest penalties even if he avoid the other evils which are usually accounted punishment."—Cicero, On the Commonwealth, Book III, Sec. 22.

. 6—R. Floyd Clarke "The Science of Law."

§ 5. **Nature and scope of statute law.** Statutes are not necessarily in accordance with fundamental truths, facts, principles; they are concrete commands, enacted by fallible men. They may be arbitrary and not based upon true reasons, true facts. Unlike common law decisions, statutes are not tentatively expressed, subject, to be more correctly expressed by later decisions. Human expressions are seldom exact, adequate, or properly limited. The expression of enacted law stands more rigid and fixed by its letter, because the language of a statute can be changed only by legislative amendment, and at a place where those whose rights are affected, cannot be heard. Statutory language cannot be corrected by courts, though actual cases may plainly show the language is too broad for what was probably intended.

Administrative statutes, setting up, not rights themselves, but rather the various governmental agencies, procedures, and remedies, for the promotion and protection of rights, are necessary and proper subjects for the legislature. But statutes cannot so well as courts, go beyond this field, and attempt to define and apply the infinite principles of human justice, or rights.⁷ Particular future rights, depend upon the unforeseeable combination of facts in each future case. Pronouncing what is right or wrong under the varying facts of different cases, is best done by courts, the governmental agency established by the people for the purpose.⁸ If the legislature, or code-makers, could foresee every combination of facts that may in future occur, have them elucidated by opposing parties, and have them reasoned and pronounced upon by impartial experts, then their pronouncements, embodied in statutes or codes, might be something like the decisions of equity and common law judges; and they

7—"Our statutes leave practically untouched that body of our laws which deals with justice" (James C. Carter).

8—Blackstone 61.

would be about as voluminous. Administrative law, is proper for the legislature; the law of private rights, is more properly for the court, the only place where, in the course of time, every conceivable right is earnestly asserted, strongly attacked, fully defended, fully discussed, and impartially decided.

§ 6. **Certain great classes of rights, ante-date and condition governments, cases, statutes, and constitutions, and in themselves constitute principles of law.**^{8a} “*All rights are vested in persons; are over persons or things; are originated, terminated, or varied only by events; and are ascertained by principles deduced from the nature of persons and things, and the relations between them.*”⁹ Certain large classes of human rights, such as the rights of personal security, liberty, and property, are indispensable conditions, facts, and thus are causes, are laws, of man’s existence and nature, as a separate independent being, of a separate family, of a separate community or nation, whose individual, family, and community independence and interests, are best promoted and protected by union and association with others like himself, by a *society of free individuals*, by as much of a socialism as is consistent with the freedom, independence, of individuals. Self preservation means self reliance, individual providence and independence, and only the sweat of each man’s brow working for all that is precious to him, can make a socialism which is true to nature and life. This is the law of our social life.

These and other “inherent” rights, principles, laws, are not merely suppositions, ideas, or theories, tolerated and accepted as right or true, by a particular generation, or majority, or government. It is the very nature and unchanging impulse of provident, independent, and family-loving man, to make secure his life, his liberty and his

8a—See authorities cited under note 5, ante.

9—George H. Smith, *Elements of Right and Law*, p. 60.

property or providence; this means his independence, makes possible his individual life. Government or no government, each man always rudely struggled to enforce these rights with his own right arm if necessary. In history throughout the generations, these great rights reassert and vindicate themselves as true facts, laws, however often they may be "crushed to earth" for a time by the force of temporary majority opinion, or by physical power. Still it behooves each generation to be vigilant and uphold their rights. For these reasons such certain rights are held in reverence, as being "inherent" and "inalienable." By their own rational force, as actual natural facts, or laws, or rights, or truths, they persist as "principles," and tend to check the arbitrary enactments of despotism or mere power. The English "Magna Charta," likewise the American "Bill of Rights," is written and enforced by human nature itself, and not necessarily by statutes, or constitutions, except for the purpose of extraordinary promulgation. They are the "prescriptive" constitutions.

§ 7. Only in the United States, through the separation and independence of the judicial power, is law, justice, established as supreme and free. In the United States, the judicial power is established by the people as a power independent of the executive, and independent of the legislative, so that the courts may the more faithfully and independently act as the representatives, the tribunes, the guardians, the spokesmen, the defenders, of the true liberties, rights, laws, of the people, and even of a minority of the people. Montesquieu said "There is no liberty, if there be no separation between the judicial power, and the legislative and executive power." Only in the United States are these powers separated as clearly as is possible. In America it is "*to secure these rights and the blessings of liberty,*" and "*to establish*

justice," that governments are established.¹⁰ Great classes of human rights are broadly recognized in "Bills of Rights."¹¹ The sober, responsible judgment of the people, resides in their courts and is expressed in the "Case Law." Their rights and liberties, are the aim and end of their governments, and can be protected only by their courts. Our courts are not sovereign and supreme; our legislatures are not supreme; only fundamental principles of law are supreme.^{11a} In America neither rulers nor majorities can be trusted to be supreme, only reason and right, only law, can be trusted. The supremacy of law and not of men is the lasting foundation of American liberty.^{11b}

For man's intellectual guidance, and for the peace and good order of society, it is necessary that some authorized agency, like the courts, through decisions, interpret, express, and formulate in language, as accurately as possible from time to time, according to their light of reason, those statutes, customs and existing principles of right, which in the aggregate constitute the law of our land. To be free from improper influences, courts must be an independent and separate power of government. Their decisions are made only in actual cases brought by aggrieved suitors, and the force and permanency of their decisions depend upon the reasons upon which they are based.

§ 8. Decisions are based upon reasons, and not necessarily upon other decisions. The words of a court decision express the law, only so far as they are based upon, or express, *reasons*. *Reasons are fundamental truths, grounds, facts*; they are *definite things*, not mere words. Reasoning is *thinging* (thinking), putting *things* together, viewing and mentioning the actual facts or

10—Declaration of Independence, Constitutions of the United States and of the various States.

11a—Herbert Spencer, *Social Statistics*, pp. 376 to 411.

11—Bailey v. People, 190 Ill. 33.

11b—Francis Lieber, *Civil Liberty*.

grounds, instead of viewing merely beliefs, assumptions of fact, or the words of some legal or political doctrine, however plausible and familiar. As Sir Henry Maine says of law, "It is better to walk by sight than to walk by faith." Reasons are the basic or constituent facts, grounds, seen by the mind. *Leges non verbis sed rebus sunt impositae*; laws are based not upon words, but upon actually existing things,¹² facts, truths, reasons. The facts of the universe, are the laws of the universe. The facts of human nature are also laws of human nature. Facts, usages, are conditions, limitations, laws, in the affairs of men. "Reason (proceeding by fundamental truths), is the highest law," says Cicero. "What is not reason is not law," says Blackstone. "He knows not the law, who knows not the reason thereof," says Coke. The vast majority of judicial decisions, either express good reasons, or are based upon good reasons and therefore are followed. The occasional unsound decisions in the course of time are not followed by other courts, and thus are reversed.

§ 9. "Case law." This is the much misunderstood "Case Law," or common and equity law; free as truth itself to grow; a treasure house of fundamental truths; its sound precedents ever correcting, improving, and enriching the language of the law; its unsound precedents pruned away in time. Case-Law tends to reasonable, instead of arbitrary decisions. It means a decision in a case should state the facts, grow out of the facts, and agree with the facts, like other correct decisions that may have preceded. It does not mean, that a new case must always be based upon some preceding case, because a preceding case may not exist. The principles of the common and equity law, pre-exist, and can be applied or expressed in any new case for the first time.^{12a} Whether or not a prior similar case exists, the lawyers and the

¹²—Burrill Law Dict.

^{12a}—Piper v. Hoard, 107 N. Y. 73.

judge, are free to reason afresh upon the facts of any case on trial, as well as to receive additional light from prior similar cases, if any exist. In order to avoid injustice, a judge may even depart from a preceding similar case, if it is manifestly erroneous, and he need only be careful to distinctly state the reasons.

Case-Law is free law, is rational law, is true law, is natural law; and for these reasons alone, is common and equity law a true science, instead of a record of arbitrary judgments. It is the most precious product and heritage of a free people. It is the stable foundation and guarantee of truth, and liberty, and right. Every American citizen and especially the student, the lawyer and the judge, should understand its source, nature and scope, and should understand the different source, nature and scope, of statute law, or code law. The principles of the one, though "unwritten," are known and established only by the facts and customs of the life of the race; the other is written and established by the pen and power of the law givers, even it may be, contrary to the facts and customs of life.

§ 10. No case law in continental Europe. On the European continent, in code countries, statutes, under the name of a code, are supposed to cover all cases that can arise, and no decisions are tolerated in the sense of making authoritative precedents. There, every combination of facts is judged under the letter of some statute, whether so intended or not. Therefore in Europe, there exist no illustrative preceding cases, to prevent the European judge from being arbitrary; and he need give no reasons for his decision; and no case, however carefully reasoned out, is officially printed and preserved as a guide for similar cases in the future.

§ 11. The equity court rescued the common law. As said before, the ancient common law judges exaggerated the importance and sufficiency of their own decisions, and

thus they narrowed the meaning of case-law, and of the doctrine, *stare decisis*. They made the common law almost as fixed as statutes. To them the king was the "fountain of justice" and they were his justices. In their view their pronouncements, decisions, were "the commands of the superior power to the subject." These ideas are still reflected in the doctrines of Hobbes, Bentham, and Austin. But truth, right, justice, has a might of its own; it finally swept away the ancient, narrow views of the common law, and compelled even the king, to invent the equity court. Had more of the ancient judges themselves fully appreciated the nature of the common law, their decisions would have been less dogmatic, and there would have been no need for the invention of the equity court; which, after all, is nothing more than a sort of common law court, which has adopted anew the true, common law spirit and method.

The equity court rescued English law from slavery to the fixed letter of precedents, into which it had fallen, and now equity and common law together really constitute one system of non-statute law, each court merely handling a distinct class of cases.¹³

§ 12. Origin of the chancellor. In ancient times the proceedings were before the king, who, with the help of his chancellor and council, judged as the nature of the cause required. Later, with the increase of business, petitions were referred to the chancellor alone, who at first was usually a bishop of the church, supposedly a better judge of "equity and good conscience" than a layman. Thus the chancellor became a judge, and petitions were addressed to him instead of to the king. The chancellor was also called "the Keeper of the Great Seal," and "the Keeper of the King's Conscience."¹⁴

¹³—1 Story Eq. 25.

¹⁴—Barnard's History of the Chancery.

§ 13. No jurisdiction in equity where there is a remedy at law. Conflicts arose between equity jurisdiction and that of the common law courts as early as the 14th century. In later centuries it came to be settled and accepted, that equity courts could have no jurisdiction where there was an adequate remedy at law, and that it did have jurisdiction where courts of law could not give a definite, adequate and complete remedy.

If a court of equity has once properly obtained jurisdiction upon some equity principle, it will retain such jurisdiction, even to the extent of granting relief which a court of law could also adequately bestow.¹⁵

§ 14. Consequence of suing in the wrong court. How serious may be the objection to a suit, that there is adequate remedy at law, or, in other words, that the particular case is not a case within the jurisdiction of an equity court, depends upon the procedural law of the particular state, or jurisdiction, in which the objection is made. In states where equity courts are entirely distinct and separate from law courts, such objection, if valid, would cause a dismissal of the particular suit, and suit then must be begun again in a common law court. In states where the equity courts and the common law courts are not separate, the objection must be raised in apt time, or it will be waived. In some jurisdictions, as in the federal courts, a case erroneously begun in equity, may simply be transferred to the law side, and *vice versa*.

§ 15. According to the case, jurisdiction of equity courts may be auxiliary, concurrent or exclusive. Equity jurisdiction in some cases may be auxiliary to, in other cases may be concurrent with, and still in other cases may be exclusive of, the jurisdiction of courts of law. For example, *auxiliary*, as in the case of a bill of discovery to aid a proceeding at law; *concurrent*, one may

15—Williamson v. Monroe, 101 Fed.

choose to sue at law for damages for a breach of contract, or sue in equity for specific performance of the same contract; *exclusive*, as in a suit where the bill seeks the reformation of a written instrument, a proceeding not permitted at common law. In other words a suit pending in a law court may be aided by bringing also another suit in an equity court, for discovery of certain evidence to be used in the suit at law. Again there are cases where there is one remedy at law and a different remedy in equity, and plaintiff can choose either court, but not both. There are other cases where the remedy is in equity alone.

§ 16. Administration of equity jurisdiction as a rule is distinct from common law jurisdiction, and equity pleading is distinct and different from pleadings at common law. In the federal system, the equity jurisdiction is lodged in the district courts of the United States, and is distinct and separate from the common law jurisdiction. In most of the states also, the administration of equity jurisdiction is distinct and separate from that of common law. Therefore, equity pleading and practice, is a distinct system. It is necessary for a student to understand the nature of a court of equity, also the principal maxims of equity jurisprudence, also the chief subjects of equity jurisdiction, in order to have an intelligent idea of equity pleading and practice.

§ 17. Equity procedure differs from that of common law. In equity pleading there is but one form of stating a claim or a defense, and that form is simply to state the ultimate facts necessary to constitute the claim or defense. At common law, there are several distinct forms of actions, according to one or the other of which, every common law case must be pleaded. In equity cases, evidence, as a rule, is reduced to writing, usually in the form of depositions, taken outside the courtroom, and afterwards delivered in court, and read to the court,

at the hearing of the case for a decree. At common law, oral evidence, as a rule, is offered before a jury in open court. At common law, a jury usually hears and judges the facts; in equity, the judge hears and judges the facts. At common law the decision of the case is in the form of a judgment for the plaintiff usually in damages; in equity, the decision is in the form of a decree, not merely giving money damages, but ordering all the varied acts or conduct which may be necessary for justice in each different case. At law, the remedy, as a rule, is damages; in equity the remedy, as a rule, is personal *compulsion to do* or personal *injunction against doing* particular acts. Common law compensates for a wrong done; equity actively corrects or prevents a wrong. Through equity even a child can call to his rescue the entire power of the state, to prevent a threatened serious wrong, however numerous and powerful the wrongdoers. Equity is the strong arm of the law, ever ready to aid the oppressed and to punish the oppressor. Equity fulfils the mission of law; it is society's active force for righteousness.

CHAPTER II

Parties

§ 18. **Parties.** All persons having material interests in the subject-matter, which will be affected, or may be settled, by a decree, should be made parties; because equity courts aim to settle, not merely the rights between the parties who are disputing, but also the rights of all others interested in the subject matter, for the purpose of doing justice completely “and not by halves,” and to prevent further litigation.

§ 19. **Parties plaintiff.** All persons interested in the subject-matter and entitled to the relief sought, should be joined as complainants. In equity a suit must be brought in the name of the real party in interest, even if he is an assignee, for example; and not, as at common law, in the name of an assignor “for the use of” his assignee. An executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name, without joining the party for whose benefit the action is brought.^a Parties who have conflicting interests should not be joined as plaintiffs.¹ If among the plaintiffs there be one not entitled to relief, the objection should be cured by dismissing the bill as to such plaintiff. If one not made a party, discloses an interest in the

^a—U. S. Eq. Rule 37.

¹—*Alton v. Jones*, 3 Barb. 397;
U. S. Eq. Rule 37.

subject-matter, plaintiff must amend his bill, and make him a party.

§ 20. Parties defendant. All persons, whose interest or rights will be affected, or can be settled, by the decree, who have not been joined as plaintiffs, or whose interests are adverse to the plaintiff, should be joined as defendants.

§ 21. Circumstances under which some parties, though having an interest in the subject-matter, can be dispensed with. As before stated, all persons whose interests can be affected by a decree, should be made parties, either plaintiffs or defendants, in order that equity may do complete justice and prevent further litigation. But where it is clear that justice may be defeated by the difficulty, delay, or impossibility, of bringing in certain parties, then, if a decree can be entered, which will not affect the rights of such unservable parties, equity will proceed to such a decree without them. Whether or not a party can be dispensed with, depends upon the nature of his interest, and whether or not his interests must be affected by the decree to be entered.² This leads to

§ 22. Three degrees of dispensability of parties:

1. **NECESSARY AND INDISPENSABLE PARTIES.** Persons having interests such that no decree can be made in the suit without affecting such interests; the courts are powerless to proceed without such parties.³

2. **NECESSARY BUT DISPENSABLE PARTIES.** Persons having interests such that the controversy cannot be determined completely without them, but still such a peculiar interest, that some kind of a decree can be entered, which will not affect such interest; the court has power to refuse to proceed without such parties; but it

2—*Marco v. Hublin*, 56 Fed. Rep. 549.

Cas. No. 14068; 1 McAll. 26; *Mallow v. Hinde*, 12 Wheat. U. S. 193.

3—*Tobin v. Walkinshaw*, 23 Fed.

will, in its discretion, proceed without them where the bill shows that the delay, difficulty or impossibility of bringing parties in, would defeat justice;^{3a} as when such parties are beyond the jurisdiction; or when such parties are unknown after due diligence to ascertain them; or if parties are so numerous that it is not practicable to bring them all in, and at the same time those absent, are virtually represented by similarly interested parties actually present in court defending the suit,⁴ as is the case with numerous members of a voluntary association; or when some parties, if named, would oust the court's jurisdiction,⁵ or, if the absent parties have acquired an interest for the very purpose of ousting the court's jurisdiction; or if parties are not yet in existence who may have a future contingent interest, and they are virtually represented by parties already in court.⁶

3. UNNECESSARY BUT PROPER (OR NOMINAL, OR FORMAL) PARTIES. Persons who have no interest in the controversy, yet have an interest in the subject-matter of the controversy, which it is convenient to settle in the suit; it is optional with the plaintiff to omit or to join such persons as parties. Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, such party upon service of subpoena upon him, need not appear and answer unless plaintiff specially requires him to do so by prayer. But he may appear, and if he does not appear and answer, he shall be bound by all proceedings in the cause. If required to answer he shall be entitled to the costs of all proceedings against him unless the court otherwise directs.^{6a}

3a—Payne v. Hook, 7 Wallace 425-433.

4—U. S. Eq. Rule 38; Hale v. Hale, 146 Ill. 227.

5—U. S. Eq. Rule 39.

6—McFall v. Kirkpatrick, 236 Ill. 306.

6a—U. S. Eq. Rule 40.

Parties in Equity

1. Necessary and indispensable parties.

Having interests such that any final decree made must affect such interests.

The court has no power to proceed without such parties.

1. When parties are beyond the jurisdiction.

2. When parties are unknown after due diligence to ascertain them.

3. When parties are too numerous to be practicable to bring them all in, and when those who are made parties have interests identical or similar to those not made parties, and thus virtually represent those not made parties and defend the suit; such as the numerous members of a voluntary association, like a club.

2. Necessary but dispensable parties.

Having interests such that the controversy cannot be determined completely without such parties, but still such a distinct kind of interest that some sort of a decree can be made which will not affect such interest.

The court has discretion to refuse to proceed without such parties, but may proceed without them when the bill shows that the delay, difficulty or impossibility of bringing such parties in would defeat justice, like the following instances:

4. When parties if named would oust the court's jurisdiction, or if such parties acquired interests for the very purpose of ousting the court's jurisdiction.

5. When the party is deceased and the legal representative is not yet appointed.

6. When parties are not yet born, or not yet in existence upon a future contingency, if they are virtually represented by parties whose interests are nearly the same.

3. Unnecessary but proper parties, sometimes called, formal parties, or nominal parties.

Having no interests in the controversy between the litigants, but having an interest in the subject-matter involved in the suit, which interest may also conveniently be settled in the suit.

§ 23. **Creating, or dividing, interests to oust the jurisdiction.** If a party has divided his interest among a number of persons for the purpose of depriving the court of jurisdiction, the suit will proceed in the absence of such parties, because such a division is an attempt to defeat justice.⁷ It would also be an attempt to defeat the jurisdiction of a federal court, if a real party in interest, who should be the defendant, makes a merely colorable conveyance of his interest to a person of the same citizenship as the complainant.

§ 24. **Parties who consent to a decree without being named as parties.** It is not necessary to pray process and serve with process parties *who it is alleged in the bill*, will consent to the decree. The decree in such case should expressly find that such parties approved the decree in writing.

§ 25. **Virtual representation of parties.** Sometimes parties who are virtually represented by others, may be bound by the decree. Such parties are deemed to be constructively before the court, though in fact they have no opportunity to be heard. Their interests must, however, be virtually and fairly, though not actually, represented by others who are before the court. For example: Executors and administrators represent creditors and distributees,⁸ and an assignee for creditors represents the insolvent debtor and his creditors.⁹

§ 26. **Naming of parties as plaintiffs or defendants.** The exact designation of parties as plaintiffs or defendants is not strictly necessary. The court may transpose a party from one side to the other, or it may proceed to a decree without making the formal change. One who

7—Union Bank of La. v. Stafford,
12 Howard, 327; Calv. Parties, p.
61.

9—Stevenson v. Austin, 3 Mete.
Mass. 474.

⁸—Sturgeon v. Barrall, 1 Ill. App.
537.

should be a co-complainant, but refuses to join as such, should be made a defendant.¹⁰

§ 27. Who are deemed parties. The parties to a suit in equity, are those only who are named as parties in the bill; plaintiffs as named in the introductory part, and defendants, those named as such, and against whom process or summons is prayed. Persons, not parties to the record, may be heard upon petition or motion, but the court will not look outside the record for the parties. One not named as a party cannot make himself a party by filing a pleading to the bill. But any one claiming an interest in the litigation may at any time be permitted to assert his rights by filing an intervening petition; but such intervention shall be subordinate to the main proceeding.¹¹

§ 28. To obtain answer under oath, of corporation officer. When the complainant desires to obtain from a corporation the answer of some officer of the corporation, under oath, such officer must be named and made one of the defendants, in the bill.¹²

§ 29. Objections as to parties. The objection that a party has been misjoined as a defendant, when he should have been joined as a plaintiff, or *vice versa*, is often disregarded, because, in equity, it is not always important. Such an objection must be made in apt time. But an objection that there has been nonjoinder of a necessary and indispensable party, may be raised, in any manner, at any time, as on the hearing or on appeal, and it goes to the jurisdiction. The court may of its own motion raise and act upon the objection. But U. S. Equity Rule 43 requires plaintiff to set the cause for hearing within fourteen days after answer, "upon defendant's objection for a want of parties," so that the question of necessary

10—Whitney v. Mayo, 15 Ill. 251.

11—U. S. Eq. Rule 37.

12—Buford v. Rucker, 4 J. J.

March 551.

parties can be determined before proceeding further. If plaintiff omits to do this the court may dismiss the bill. The objection that necessary, but dispensable, parties were not joined, must be raised by demurrer, plea, or answer, in which the proper omitted parties must be pointed out, not by name, if that is impossible, but in such manner as to indicate the precise objection and enable plaintiff to amend.¹³ If such objection is delayed till the hearing in the federal courts, the court is at liberty to make a decree, saving the rights of the absent parties.^{13a}

§ 30. Correcting defects as to parties. The question of nonjoinder of necessary parties, should, if possible, be raised before incurring the delay and expense of taking testimony.

The proper course in case of misjoinder is to amend by dismissing as to the one improperly joined. Where the defect is a non joinder of necessary parties, the suit is merely suspended. The court should not proceed until the absent parties are before it, but the proper order is for the cause to stand over, with leave to amend by adding new parties, and if that be not done within the time fixed, that the bill be then dismissed. An appellate court will not reverse a decree for want of parties who ought to have been joined, provided sufficient parties were before the court to sustain the decree as rendered; and where the decree cannot be sustained, the court will, generally, instead of dismissing the bill, remand it to the court below, that the omitted parties may be brought in.

§ 31. Partners should be named as individuals. Where a co-partnership, or association other than a corporation, is a party, the names of the individuals must be set forth,

13—U. S. Eq. Rule 44.

13a—U. S. Eq. Rule 44.

14—The Protector, 11 Wall. 82;
Chapman v. Barney, 129 U. S. 677.

because it is not proper to use the firm name.¹⁴ And the full given names of the parties in all cases should be used instead of the initials.¹⁵

§ 32. Federal jurisdiction based on diverse citizenship. Bills in the federal courts, when based on diverse citizenship, must distinctly and positively aver the diverse citizenship of the parties, and suit must be brought in the district where the defendant resides, or where he is found when served with process.

¹⁴—*Monroe Cattle Co. v. Becker*,
147 U. S. 47; U. S. Eq. Rule 25.

CHAPTER III

Process or Summons

§ 33. **Process, service, and return.** The issuing and serving of formal process or summons, except where there is a voluntary general appearance, is essential, to obtain jurisdiction over a party defendant, and the facts of service should appear of record. Unless the statute provides otherwise, process should be served by the sheriff or marshall. The method prescribed must be strictly followed. In order to confer jurisdiction the "return" must state specifically in what form or manner service was made, showing full compliance with law, identifying with certainty, the person served with the one named in the writ of process. Where service is made by a private person, proof of service must be by affidavit. Constructive service, by publication or by service with a copy of the bill, is provided for by statutes, in cases where the proceeding is *in rem*, though the suit be personal in form; as for instance, a suit for the foreclosure of a mortgage. Strict compliance with the statute as to constructive service must affirmatively appear of record.

In the federal practice defendants already before the court who are made parties defendant to an answer in the nature of a cross-bill, need not be served with process, but must reply to such counter-claim upon receiving proper notice.¹

§ 34. **Practice in U. S. courts in obtaining jurisdiction over parties not found within the district.** When in any

1—U. S. Eq. Rule 31.

suit in equity, commenced in any court in the United States, to enforce any legal or equitable lien or claim against real or personal property within the district where such suit is brought, one or more of the defendants is not an inhabitant of, or found within the district, or does not voluntarily appear, the court may enter an order directing such absent defendant to appear, plead, answer or demur to the complainant's bill on a day therein designated. This order must be served on such absent defendant, if practicable, wherever found; or, where such personal service is not practicable the order must be published in such manner as the court directs. In case such absent defendant does not appear, plead, answer or demur within the time limited, or within some further time to be allowed by the court in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it is lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but such adjudication, as regards such absent defendant without appearance, affects only his property within such district."

2—Sec. 13 U. S. Statute, in force
June 1, 1872.

CHAPTER IV

Appearance in Court

§ 35. **Mode of appearing in court.** On or before the day to which process, or summons, is made returnable, to prevent the entry of a court order declaring a default against him, the defendant, either personally or by his solicitor, must "enter his appearance," either by filing his defensive pleading, or by filing a writing, stating he enters his appearance. If defendant has been served with summons within less than due time before the "return" day, then the appearance day, in most jurisdictions is the next rule day following.¹

§ 36. **Voluntary appearance.** A defendant may waive the service of process, or, having been served, may waive the time allowed him, and enter his appearance. The voluntary appearance of a defendant not served with process, has the same effect as the service of process.²

§ 37. **Effect of appearance.** Appearance waives all defects of process or of service of process,³ and also waives all defects of jurisdiction over the person, unless the appearance is a *special* or *limited* appearance.

§ 38. **A special or limited appearance,** is one expressly limited, upon the record, to be an appearance not for the purpose of submitting to, but "for the sole purpose of objecting to the court's jurisdiction."

1—U. S. Eq. Rules 12, 16.

3—1 Barb. Ch. 78.

2—Chatterton v. Chatterton, 132

Ill. App. 31.

CHAPTER V

Bills in Equity

§ 39. **The chief pleadings.** The chief pleadings in an equity case are: (1) the bill of complaint; (2) the demurrer, plea, or answer, of the defendant; (3) the replication of the complainant.

§ 40. **Purposes of written pleadings.** At the trial of every case each party must prove every allegation of *the material facts necessary to constitute his claim or his defense*. Therefore, these material facts must be made known to the parties before trial in order that they may ascertain and secure the proper evidence and witnesses, *pro* and *con*. *Pleadings*, stating these constituent facts before trial, *serve as record notice to the court, to the parties, and to the world, of the constituent facts submitted for trial as a valid claim or defense*. Parties are thereby protected against surprises and false proofs at trials, against the trial of claims or defenses invalid upon the face of the pleadings, against the trial of claims or defenses or facts, confessed by the pleadings, and against a second litigation upon facts once before solemnly adjudicated. Only through the requirement of definite, written pleadings, can the invalidity of a claim or defense be discovered before trial. Before being subjected to the trouble and expense of a trial, parties are given opportunity to challenge, by demurrer or other objection, the validity upon its face, of any proposed claim or defense. The time old rule, that a decree must conform to the allegations as well as to the proofs, of the parties, is not only one that justice requires, but one that necessity

imposes upon the courts.¹ By proper pleadings most controversies can be narrowed down to a few issues.

§ 41. **Indefinite pleadings give insufficient notice.** Pleadings which pretend merely to identify the transaction sued upon, or to mention the mere, general nature of a claim or defense, without pointing out all the necessary constituent facts of the claim or defense,—give some notice, but such pleadings may be too broad for sufficient notice. Insufficient notice may be as harmful as no notice. Such indefinite pleadings, and the so-called “oral pleadings” (no pleadings) are tolerated in minor courts not of record, in most “justice of the peace” courts, and in “Probate claims,” which are usually uncontested; because of the limited jurisdiction of such courts, and because of the usually limited nature of the controversies. Such pleadings are plausibly advocated because they require no care, pains, or skill. Any important and strongly contested controversy demonstrates the necessity of definite issues and pleadings. Indefinite pleadings, as a rule, are not in actual practice, tolerated in American courts of record. Definite pleadings, more than any other procedural requirement, promote justice, protect private rights, and save public time and expense. Definiteness is a “reform” tested by the ages. Fair notice of the elements which must be proved, is only fair play and good method to all concerned.

§ 42. **Liberty to amend is no excuse for indefinite pleading.** Pleadings are definite written statements to advise the court, the parties and the world, of the facts submitted for trial; to prevent the trial of claims and defenses baseless upon their face; to prevent surprises and false proofs, to prevent repeated litigations of the same facts, to prevent wasting the time of the court and misleading the jury by irrelevant proofs. They are therefore required to be definite and complete as a rule,

¹—Crocket v. Lee, 7 Wheat. 522.

and especially so, if the opposite party challenges the validity or correctness of the claim or defense as stated, by demurrer or other objection. Courts and statutes are liberal in permitting amendments, where a pleader fails to plead properly, but a pleader cannot afford to trust to his being allowed always to amend. The lawyer who does not fairly understand the subject of pleading and practice should secure the aid of a good pleader and trial lawyer. The permitting of amendments is limited, and poor pleading is often discovered only when too late. Most of the laws of procedure are as necessary for justice as are the laws of rights and wrongs. It is the peculiar business of a lawyer to be familiar with procedural law. A layman usually knows his rights, but he seldom knows the machinery for enforcing them, and therefore he seeks the lawyer.

§ 43. If no demurrer or objection to pleading, judgments based thereon usually stand. The requirement of definite and complete pleadings, is not always so rigidly enforced by all the courts, as to defeat justice in a suit. If no demurrer or other objection to insufficient pleadings is made, the judgment is often permitted to stand. Nevertheless the record notice to the world of such a suit, as notice by *lis pendens*, and as *res adjudicata*, depends for its efficacy upon the definiteness of the pleadings, as well as of the decree.

§ 44. Pleadings proposed to be under oath. In order that the student may better understand the true nature and purpose of pleadings, it may be added, that perhaps the chief reform needed in pleadings, is that they be required to be under oath, without regarding statements therein contained as evidence in the cause, but as mere pleadings. Also, a material allegation in one pleading, ignored or not denied in the opposite pleading, should be held to be confessed by such opposite pleading. In federal practice unanswered allegations of the bill are

deemed to be confessed. Rather than commit perjury, parties will then plead the true facts, and confess the true facts. Questions of fact left for trial and proof, will be less in number. Many cases will be determined by the pleadings without trial. A person pleading without the responsibility of an oath, is encouraged to make exaggerated, reckless and false allegations and denials. In some jurisdictions, like Illinois, the bar associations have recommended this reform. Such pleadings may well be supplemented by permitting further interrogatories to be propounded, and to be answered under oath, also without the effect of regarding such answers as evidence. Answers to interrogatories are regarded as additional pleadings, which of course may confess facts as well as deny them. Such is now the practice in the Municipal Courts of Chicago. In the hands of intelligent pleaders controversies are thus narrowed down to very few issues, saving much public and private time and expense.

In the new federal practice rule 58 provides for additional interrogatories from either plaintiff or defendant to be answered under oath, and rule 20 provides that the court may order either party to file a bill of further particulars, giving a further and better statement of the nature of a claim or defense. Thus in the federal practice, through a sort of secondary pleadings, definite issues are formulated before trial if the parties insist.

§ 45. Definite pleadings required in equity. At common law, the "common counts" declared upon by a plaintiff, and the "general issues" pleaded by a defendant, are so broad as to give practically no fair notice to the parties or to the court, of the true issues of fact to be tried. In equity pleadings, there are no "common counts" and no "general issues," and pleadings must plead the definite material facts.

§ 46. **Bill, petition, information.** A suit in equity, if brought by a private person, is begun by a "Bill" or "Petition." If brought by the Attorney General, or by the State's Attorney, on behalf of the government or the people, the complaint is called an "Information." A bill in equity corresponds to a declaration at law, but it has an additional feature. Besides being a statement of a cause of action, the bill is also an examination of the defendant as a witness for the discovery of evidence from him, which is material to complainant's case. The stating part, the charging part, the interrogatory part of a bill in equity, all call for full answers with full details.

§ 47. **When suit begins, as against statute of limitation, or to constitute notice by *lis pendens*.** Although we speak of beginning a suit by filing a Bill, or an Information; yet as against the running of a Statute of Limitations, a suit is not considered as begun, in most states, until process or summons has been issued and in good faith delivered to the sheriff for proper service. And a suit is not considered as begun so as to be notice to the world by *lis pendens* (pendency of suit), until the bill is filed and summons is served, or appearance is entered.

§ 48. **Bills original and bills not original.** Bills are:

(1) Original, which begin a suit; and (2) Not Original, which are filed in a suit already begun.

§ 49. **Original bills:**

(1) **BILL OF COMPLAINT**, wherein a complainant seeks a decree determining his claims against the defendant, such as a bill for specific performance, or a bill to foreclose a mortgage, or a bill for a breach of trust;

(2) **BILL OF INTERPLEADER**, wherein a complainant seeks a decree determining not his own claims, but those

of rival claimants to property in his hands, in order that he may safely turn over the property to the rightful owner.

Where two or more persons claim the same property in different titles, whether legal or equitable, from one who is in the position of an innocent stake holder, the latter, if molested by a suit actually brought or threatened, may file his bill of interpleader for the purpose of compelling the claimants to litigate their rights at their own expense, and thus protect himself from all vexation and responsibility.

Such bill will lie only where adverse titles or claims are derived from a common source, and where the complainant has no claim or interest in the subject-matter or controversy.

(3) **BILL OF CERTIORARI**, chiefly used to transfer a cause from an inferior court to a higher court (which in modern practice is accomplished in most cases by statutory appeals and writs of error);

(4) **BILL OF DISCOVERY** (now almost obsolete because by statute in most states the parties to a suit can be compelled to testify), asking defendant not for relief, but to disclose facts in his knowledge, or to produce writings in his control;

(5) **BILL TO PERPETUATE TESTIMONY, OR BILL TO EXAMINE WITNESSES DE BENE ESSE**, for the purpose of obtaining and preserving evidence against probable loss, because of old age of witnesses, or because of illness, or because of intended absence of witness.

The first three bills are known as bills praying for relief; the last two are known as bills not praying for relief.

§ 50. Bills not original:

(1) **SUPPLEMENTAL BILL**, setting forth facts occur-

Original Bills

Bills praying relief.	The ordinary bill in equity praying relief.	{ A bill praying relief as to rights claimed by complainant against claims of defendant.
	Bill of Interpleader.	{ Bill where complaint claims nothing for himself, but asks that the onflcting claims of the defendants respecting property in his hands be settled by a decree.
	Bills of certiorari	{ A bill praying for a writ to remove a cause to a superior court.
Bills not praying relief.	Bill to preserve evidence.	{ To perpetuate testimony. To examine witnesses de bene esse.
	Bills of discovery.	{ Asking for disclosure of facts in defendant's own knowledge, or For disclosure of records, deeds, or writings under defendant's control, etc.

Original
Bills.

ring after a bill is filed, and correcting the bill to agree with such facts; or to introduce a new party made necessary since a bill was filed. A supplemental bill thus differs from an amendment to a bill, which is merely a correction of the original bill and is treated as part of the original bill.

(2) **CROSS-BILL**, filed by a defendant against complainant, or against a co-defendant to avoid possible dismissal of the bill, and to gain certain affirmative relief in the same suit beyond a mere defense.

(3) **BILL TO IMPEACH A DECREE**, for fraud.

(4) **BILL TO SUSPEND A DECREE**, under certain circumstances, or because of certain facts discovered after hearing of the cause, and after a decree.

(5) **BILL TO CARRY A DECREE INTO EFFECT**, when from neglect or other cause, it is impossible to do so without a further order of the court.

(6) **BILL OF REVIVOR**, to revive a suit which would abate by the death of a party, or for certain other reasons. Modern statutes, in the case of the death of a party, provide that the suit may proceed against the representatives of the deceased, if the death is suggested upon the record by motion, naming the new parties.

(7) **BILL OF REVIEW**, to review, alter, or reverse a decree, either because of an error of law, or because of new matters of evidence discovered after the decree.

§ 51. **Bill of complaint.** The bill of complaint is much more frequent than other original bills, and its importance justifies a rather full treatment and careful study.

§ 52. **An original bill usually has nine formal parts:**

(1) **THE ADDRESS TO THE COURT**, by correct title of the court. For example:

“To the Judges of the Court of.....,
In Chancery Sitting.”

(2) **THE INTRODUCTORY PART**, introducing the names, citizenship and abode of the parties.²

For example: "A. B., a citizen of, and residing in the County of....., in the State of,," brings this Bill of Complaint against C. D., a citizen of and residing in the County of, in the State of³

(3) **THE STATING PART**: stating the facts constituting the claim.

"And the said A. B. complains and avers as follows:"

(Here follow statements, allegations, averments, of all ultimate, constituent facts showing:

(a) A right recognized by equity courts, and in a clearly described subject-matter, and a right possessed by complainant, and not barred by lack of residence, or by *laches*, or by statutes of limitation, or statute of frauds, nor by facts of estoppel, or of "unclean hands," nor by omission of "offer to do equity."

(b) A clearly described wrong, or violation of that right, actual or threatened, not remediable at law, with the names of the defendants liable for doing or threatening the wrong.

(c) A substantial injury, damage, or loss of property, actual or threatened, to complainant, or to his family, or to his property, growing out of the subject-matter of the suit.

(d) The full names of all other persons as defendants, who have or claim to have, rights in the subject-matter of the suit, which rights may be affected by a decree.

(e) The full names, citizenship and residence by state

2—The names of the parties should not occur in the caption or title of an original bill. (Jackson v. Ashton, 8 Pet. 148; Spencer v. Goodlett, 104 Tenn. 648). Such caption is used only in the pleadings that follow after filing the bill.

See also U. S. Eq. Rule 25.

3—U. S. Eq. Rule 25; 1 Smith Ch., §2; 1 Barber, 35; Story 5th Ed., Sec. 20.

and county of all parties. If there are persons other than those named as defendants who appear to be proper (necessary) parties, the bill should state why they are not made parties, as that they are not within the jurisdiction of the court, or cannot be made parties without ousting the jurisdiction.^{3a}

(f) All other principal facts necessary to constitute the claims and to justify an equity court in granting each particular relief prayed for.

In the federal courts, if any party be under any disability, the fact must be stated;^{3b} also every bill brought by stockholders of a corporation against the corporation and other parties, founded upon rights which may properly be asserted by the corporation, must under oath allege the plaintiff was a shareholder at the time of the transaction of which he complains, and must make the other certain allegations required by federal rule.^{3c}

(4) THE CONFEDERATING PART, averring that "the defendants named, confederated with diverse other persons, unknown," and asking "leave to join such other persons when discovered."

This part of the bill is obsolete, because now new parties can be added by amendment to the bill.⁴

(5) THE CHARGING PART, additional charges or statements, used for two purposes:

(a) To anticipate the defenses expected in defendant's answer and to avoid or rebut them with countercharges. This is a sort of special replication in anticipation of the defense expected.

For example: A charge "that defendant will pretend to have written release of all claims; but plaintiff charges and avers that such pretended release was obtained by the fraudulent acts of said defendant, as follows, etc."

3a—U. S. Eq. Rule 25.

3b—U. S. Eq. Rule 25.

3c—U. S. Eq. Rule 27.

4—Supervisors v. Mississippi B. R. Co., 21 Ill. 367; Story 5th Ed., Sec. 29.

This sort of a charging part is used for the purpose of avoiding later filing a special replication or (where special replications are abolished) an amendment to the bill, to meet a defense expected in an answer. Complainant may omit this formal charging part, and use the stating part of his bill for the same purpose.⁵

(b) To charge or state some of the *evidential facts* which complainant relies on to prove the main facts of his case previously averred in the stating part.

This is done to elicit more exact discovery, to avoid vague and general answers, which might otherwise be given to the more general facts forming the stating part of a bill. A defendant must answer fully all facts alleged, whether ultimate facts stated, or evidential facts charged.⁶ Thus in a charging part the evidential facts may repeat, in the form of items of evidence, the story told in the stating part; and further on, the interrogatory part of the bill, in the form of a series of questions, may again repeat the story. Hence the criticism that a bill in chancery sometimes "is a story thrice told."

Having once in the stating part of his bill alleged the necessary main facts constituting a complete cause of action, a pleader is not compelled to repeat, nor to add to, the story by a charging part charging any items of evidence, nor by a special interrogatory part asking a series of special interrogatories. He will omit these additional parts unless he feels sure that certain strong evidential facts charged, or certain pointed interrogatories, cannot be evaded nor avoided by defendant with success. Since interrogatories must always be based upon facts alleged in the bill, a pleader may need to charge certain evidential facts, if not already distinctly stated in the stating part, in order to form a basis for desired interrogatories.

5—U. S. Eq. Rule 25; Old U. S. Eq. Rule 21.

6—Bank v. Levy, 3 Paige, N. Y. 606.

(6) THE JURISDICTION PART, averring that complainant's case is within the jurisdiction of an equity court, and that except in a court of equity he has no remedy.

This clause need not be used, and never was necessary. If the stating part of the bill does not show a proper case for equity, this clause will not help, and its omission does no harm.⁷

But in the federal courts because of their special and limited jurisdiction, the bill must contain a short and plain statement of the special federal grounds upon which the court's jurisdiction depends.^{7a}

(7) THE INTERROGATORY OR DISCOVERY PART: (1) A general interrogation or prayer that defendants answer each matter stated in the bill "as fully as if specially interrogated thereon, not only according to positive knowledge, but upon their best recollection, information and belief;" to which general prayer to answer the bill, the pleader may add (2) a *special prayer to answer a particular list of interrogatories*, which the pleader may set forth in this part of the bill.⁸

The general prayer for answer is usually called "The General Interrogatory;" and the list of questions, if here included, is called "The Special Interrogatories."

Whether this part of the bill consists of the general interrogatory alone, or of both the general and special interrogatories, it is the part of the bill *which seeks and obtains discovery* from the defendants, to disclose the full truth in their answer, as to all matters stated in the bill. And this is true whether the bill be one for discovery only, or a bill for both relief and discovery, as is more usual.⁹ The general interrogatory should never be omitted, but the special interrogatories may be omitted. This general prayer for a full answer, by its

7—Botsford v. Beers, 11 Conn. 369; Old U. S. Eq. Rule 21.

7a—U. S. Eq. Rule 25.

8—1 Dan. 486.

9—Hopkins v. Medley, 97 Ill., 414.

own force, compels the defendant to answer fully, to admit or to deny each material allegation of fact set forth in the bill, with full circumstances and details. A defendant may deny knowledge or information or recollection concerning a certain allegation, and declare himself unable to form any belief concerning it; and therefore, he may deny such allegation, and call for strict proof thereof; but he must in this way, or by admission or denial, answer every allegation in the bill. The peculiar double nature of an answer in chancery, containing as it does, full responsive disclosures, as well as matters of defense, so different from an answer at law, which need answer nothing so long as it sets up a defense—is due to this general comprehensive prayer for discovery in the chancery bill.¹⁰

The special interrogatories are used, if desired by the pleader, for the purpose of more exact discovery from the defendant as to facts which the pleader thinks cannot be evaded or escaped by the answer. Special interrogatories must be based upon matters of fact stated in either the stating part or the charging part of the bill.

It should be noted that in the old federal equity practice, the old rules, 39 and 40, *dispensed with full answers where special interrogatories were omitted, if the answer filed, set forth a defense* in bar or to the merits, such as might be set forth in a plea. Therefore, in the old federal equity practice, if a pleader desired full responsive disclosures in the answer, he must include a list of special interrogatories.

Under the new federal practice, new rule 30 requires the defendant to set out his defense to each claim asserted by the bill, specifically admitting or denying or explaining the facts upon which the plaintiff relies. Thus under the new rules, it would seem that full answers must be made to each allegation in the bill. Special in-

10—Hopkins v. Medley, 97 Ill. 414; 2 Dan. 246.

interrogatories are separate from the bill. Rule 58 provides that plaintiff may file interrogatories *after* filing his bill and defendant may file interrogatories *after* filing his answer, and such interrogatories filed by either party must be answered under oath.

(8) THE PRAYER FOR RELIEF, wherein the complainant prays the court to order and decree the defendant to do, or refrain from doing, the certain things mentioned in the prayer, and wherein complainant also prays in general "for such other and further relief as may be just and equitable."

If the specific prayer is erroneous, the court will, under the general prayer, grant such relief as may be proper upon the case stated in the bill.¹¹ In the absence of a general prayer this might not be done.¹² But in modern practice only a statement of and prayer for the special relief desired, is necessary.^{12a} A declaration at common law contains no prayer for relief. In equity the kind of relief desired must be prayed. In the federal courts alternative forms of relief may be prayed.^{12b}

If an injunction is sought, complainant in this part should *specifically pray also for a decree, enjoining the particular acts complained of in the stating part of his bill*; because the writ of injunction, if obtained, must follow this prayer and be limited by it. The general prayer for relief ordinarily is not a sufficient basis for a writ of injunction.¹³ A writ of *ne exeat* or any other special writ or order, if sought by complainant, should be prayed for in the prayer for relief.¹⁴ But the statutes of many states permit the writ of *ne exeat* to issue upon special petition, whether or not prayed for in the bill.

(9) PRAYER FOR PROCESS OR SUMMONS, whereby com-

11—2 Dan. 489.

12—Driver v. Fortner, 5 Port. Ala. 9; Wilkin v. Wilkin, 1 Johns. Ch. 111.

12a—U. S. Eq. Rule 25.

12b—U. S. Eq. Rule 25.

13—Story Eq. Pl., Sec. 41.

14—U. S. Eq. Rule 25.

plainant prays the court to grant issuance of process or writ of summons, commanding the defendants to appear and answer the bill; and whereby complaint also prays the court to grant other special writs, if desired, like the writ of injunction, or the writ of *ne exeat*.¹⁵

The prayer for process must name the defendants against whom process or summons is to issue.¹⁶ The prayer for the writ of injunction should also in this part name or describe the persons against whom the writ is to issue.

If any defendants are infants, or are otherwise under guardianship, the fact should be stated or recited, so the court may make order thereon as justice may require upon the return of process.¹⁷

U. S. Equity Rule 25 makes it unnecessary to pray the court to grant issuance of process, or summons. In federal practice, this prayer for process may be omitted.

SIGNATURE AND VERIFICATION. The above is a brief summary of the nine parts usually found in a bill in chancery. To these nine parts may be added a *signature part*, being the signature of the complainants and of their counsel; and there may also be added a *verification part*, being the affidavit verifying the truth of the facts mentioned in the bill, in cases where bills are required to be verified under oath. A bill is usually signed by complainant, and should always be signed by the solicitor for the complainant.^{17a} When an injunction, restraining order, or a writ of *ne exeat*, is prayed, the bill should be sworn to by the complainant. If special relief during the suit is desired in the federal courts, the bill must be sworn to by some one having knowledge of the facts upon which such relief is asked.¹⁸ Also bills *de bene esse*, bill to perpetuate testimony, bill of interpleader, bill of review, for newly discovered evidence, and a bill where a corporation is com-

15—Story Eq. Pl., Sec. 44.

16—1 Smith Ch. 85; 1 Barb. 38;

17—U. S. Eq. Rule 25.

17a—U. S. Eq. Rule 24.

18—U. S. Eq. Rule 25.

plainant, should be verified.^{18a} Otherwise, unless a statute requires it, no oath to the bill is necessary if answer under oath is waived.¹⁹

§ 53. **Parts of a bill, which may be omitted.** Though these nine parts are usually found in a bill, nevertheless,—

The confederacy part should be omitted;

The charging part may be used or not, as deemed advisable by the pleader;

The jurisdiction part should be omitted, except the special new kind of jurisdiction clause required by Federal Equity Rule 25.

The general interrogatory part must always be used, but the special interrogatory part, only when deemed desirable by the pleader. In the United States equity courts, it would seem that special interrogatories can be filed by a plaintiff only by a separate additional pleading after the bill is filed.²⁰

18a—Fletcher Eq. Pl. & Pr.,
Sec. 83.

19—1 Barb. 44.
20—U. S. Eq. Rule 58.

CHAPTER VI

The Stating Part of a Bill

§ 54. **The stating part of a bill.** The stating part of a bill in chancery is the most important part of a bill, and an additional chapter is needed for fuller treatment of this part.

§ 55. **The facts, the law, the court's mandate.** Every case in equity involves (1) the court's determining and declaring the main facts, *findings or conclusions of fact*; (2) the court's determining and declaring the legal meaning, effect, consequences of the main facts, (the rights and duties growing out of the facts, the principles of law applying to the facts), *findings or conclusions of law, upon the facts*; (3) the court's enforcing, ordering, the rights and duties growing out of the facts, *enforcing the law of the facts*.

§ 56. **Principal duties of the trial lawyer.** A careful lawyer will first possess himself of, and afterwards keep in hand, the clear evidence of all necessary facts constituting his claim or defense. He will then clearly plead the main facts which make his case or defense. He will then in court clearly prove the pleaded main facts by his evidence. He will then present to the judge a prepared decree clearly finding those main facts in form as pleaded, also clearly finding the law (or rights and duties involved in those facts), and clearly ordering the particular acts or conduct necessary to enforce such rights and duties. The careful lawyer will be sure he has the evidence of the necessary facts; he will be sure

to plead the facts correctly; he will be sure to prove them by competent evidence; he will be sure his decree states the facts as findings, and also states the findings of law, and that the ordering part enforces their legal consequences. His complaint or defense must tally with each fact necessary to constitute his claim or defense, the proof later, must tally with each allegation of fact in his pleading; and then the decree must tally with the allegations and proofs. These requirements are fundamental.¹

§ 57. **It may be well to draft the decree before the bill.** Perhaps a lawyer should write his decree before he draws his bill. A properly drafted decree contains the whole case from beginning to end. After writing a decree finding the facts, finding the rights and duties involved in those facts, and ordering the acts to be done which enforce those rights, a lawyer will thoroughly understand his case; otherwise, he may not see his whole case, and mistakes may occur. The decree may as well be written first as last, and nothing prevents more mistakes or better clears the way. The decree certainly should be drafted before entering upon the proofs, because its completion usually brings to light the need of additional or amended allegations in the bill, with which proofs must correspond, and thus mistakes or omissions are avoided.

Thus a lawyer's chief business is the stating and proving of facts. The facts point out the law involved.

§ 58. **Only ultimate facts should be pleaded except in charging part.** In stating the facts, only the main or ultimate facts, which constitute the claim or defense, should be alleged, without stating the circumstances or the evidence of such main facts;² but evidential facts

1—Crocket v. Lee, 7 Wheat. 522.

27 Mich. 257; Brown v. City of Au-

2—Story's Eq. Pl. Sec. 28; U. S. Eq. Rule 25; Wilson v. Eggleston,

rora. 109 Ill. 165; Stone v. Ferry, 239 Ill. 606.

may be stated in the charging part of the bill,³ and evidential facts must be pleaded in two exceptional allegations, namely, of fraud, and of usury. Ultimate facts are those facts which immediately lead to the conclusions of law in the case. An ultimate fact may be a simple, evidential fact, or it may be a complex fact or conclusion of fact based upon subordinate evidential facts; and an ultimate fact may be based upon subordinate facts and laws, like the fact of marriage.⁴

§ 59. Conclusions of law, the legal rights and duties growing out of the facts, should seldom be alleged. The pleader should avoid stating the conclusions of law or legal consequences involved in the facts, except only when necessary to add to the clearness of facts stated, which warrant the conclusion. Legal conclusions, or findings of law, are for the court to make. A pleader should not state them unless the court might otherwise miss the legal effects of facts which are stated.⁵ Stating conclusions of law is sometimes necessary for clear pleading;⁶ and if accompanied by the facts which warrant them, they do no harm and at the worst must be treated as a surplusage. Courts encourage the pleading of the legal effect of instruments rather than pleading them in words and figures fully. But copies of the instruments should also be made a part of the bill by reference.

§ 60. Exhibits should be annexed. If a bill makes an instrument a part thereof without annexing a copy, or setting forth the contents, it is bad on demurrer.⁷ The substance of an exhibit should be set forth, even if the

3—Bank v. Levy, 3 Paige, N. Y. 573; Crane v. Shaefer, 140 Ill. App. 606. 647.

4—Koch v. Arnold, 242 Ill. 208.

5—2 Dan. 22.

6—Allen v. O'Donald, 23 Fed.

7—Martin v. McBryde, 3 Ired. Ch. 531.

exhibit is annexed. Exhibits forming part of the bill will aid defective statements in the bill.⁸

§ 61. The allegations are the foundations of the proofs and of the decree. A party cannot have relief upon a case not stated in his bill. All ultimate facts intended to be proved must be alleged; otherwise evidence cannot be received of the facts.⁹ *Secundum allegata et probata*, the decree in the case must correspond with the allegations and the proofs.

§ 62. All necessary facts should be averred, clearly, and positively. The party seeking the aid of a court of equity, in his bill must aver all the facts necessary to entitle him to its aid. His right, title and interest, should be stated with accuracy and clearness. The citizenship and residence, by state and county, of complainants and defendants, should be distinctly averred, because it is usually one of the grounds of the court's jurisdiction.¹⁰ If an allegation be capable of two meanings, the one most unfavorable to the pleader will be adopted. The material allegations of the bill must be clearly and positively averred, and in a traversable form and not "upon information," especially if they are peculiarly within the knowledge of the party pleading.¹¹

§ 63. Allegations upon information and belief. If the allegations are not presumptively within the knowledge of the party pleading, they may be pleaded upon information and belief. An allegation based upon information should allege complainant's belief in the truth of the information, and base the statement of facts upon such belief. For example, "Complainant is informed and believes, and therefore states the fact to be, that defendant on May 7, 1911, did sign, seal and deliver, " etc.

8—*Benneson v. Savage*, 130 Ill. 352.

10—*Turner v. Bank*, 4 Dall. 8.

9—*Crockett v. Lee*, 7 Wheat. 522; *Story's Eq. Pl. Sec.* 28.

11—*McConnoughy v. Jackson*, 101 Calif. 265.

§ 64. **Allegations of time and place.** The time and place of each fact need not be stated in equity unless the time or the place is material. At common law, time and place must be alleged with every occurrence of fact, else the pleading would be bad in form.

§ 65. **Allegation of defendant's claims.** Where the extent and character of defendant's rights are more within the knowledge of defendant, it is sufficient to allege generally that the defendant has or claims to have, some rights in the subject-matter of the suit, leaving it to the defendant to disclose in his answer the nature and extent of such rights.

§ 66. **Bill must cover entire controversy.** The bill must cover the whole subject in dispute so as not to expose the defendant to be harassed by another suit when one suit may suffice.¹²

§ 67. **Offer to do equity.** Complainant must allege in his bill that he has done or is ready to perform, every act necessary to entitle him to the relief he seeks; or he should state a sufficient excuse for its non-performance. It is a maxim of equity that he who seeks equity must do equity. In stating his offer to do equity the pleader should set forth precisely the things he offers to do.

§ 68. **Bill should not impute laches.** When a bill is filed long after the cause of action accrued, the facts relied upon as excusing the delay must be set forth in the bill; otherwise the bill will impute *laches*; and may be attacked by demurrer or by plea, or by special statements in an answer, mentioning the *laches*, or the court of its own motion may refuse to consider the case.¹³

§ 69. **Basing suit on alternative grounds.** The stating part, may base the cause of action upon alternative

12—Purefoy v. Purefoy, 1 Vern. 29; 1 Barb. 40.

13—Sullivan v. Railroad, 94 U. S. 806.

grounds, if the true facts are not known to complainant, so that if one ground fails, complainant may rely upon the other, and these two grounds may be inconsistent with each other.¹⁴

§ 70. **Evidential facts and not general charges should be pleaded to allege fraud or usury.** Where relief is sought on the ground of fraud or of usury, general charges should be followed by allegations in which the circumstances and facts upon which such charge is founded are fully and specifically stated. Fraud cannot be alleged by mere statements of conclusions or inferences, as for instance, the statement that the defendant obtained a certain property by "fraud and misrepresentation." There must be a distinct averment of the facts and circumstances constituting the inference or conclusion of fraud, so that the court, if there were no appearance, could from the allegation and the proof supporting them, find that the fraud had been committed, and so that the defendant may be able to answer and explain such facts and defend the charge. An allegation of fraud made upon information and belief cannot be sustained, unless the facts upon which the belief is founded are stated in the pleading.

§ 71. **Oyer in equity.** The practice of allowing *oyer* is unusual in chancery.¹⁵ *Oyer* means the right to see, or hear read, some document in court as a part of the pleadings. In federal practice the court rules provide for compelling the production or inspection of documents which are in the control of either party and contain material evidence.

§ 72. **In federal practice, charging part, may be placed in stating part of bill.** In the federal equity practice, old U. S. Equity Rule 21 permitted the charging part of the

14—Varick v. Smith, 5 Paige Ch. Rep. 137.

15—Hamilton v. Downer, 152 Ill. 631.

bill to be omitted, and permitted such charging part of the bill to be incorporated in the stating part of the bill. That is to say, the old federal rule permitted the complainant in the stating part of his bill to anticipate an expected defense, and to allege any matter necessary to explain or avoid such expected defense. There is nothing in the new rules to prevent such practice; and in any other jurisdiction it can do no harm to incorporate a charging part in the stating part of the bill. Of course the complainant may, if he chooses, omit to anticipate a defense or to include a charging part. He may wait until the answer is filed which states the defense, and then he may meet such new matter of defense by filing an amendment to the bill. In federal practice under new rule 31 any new or affirmative matter in an answer is deemed to be denied by plaintiff without a replication, and without his filing an amendment of his bill to meet such new matter; and the cause is deemed at issue by the filing of the answer.

§ 73. **Multifariousness.** The bill must not be multifarious. A bill is multifarious (1) when it unites several distinct and incongruous matters between the same parties; or (2) when it unites several matters, in all of which the complainants on the one side, or the defendants on the other side do not have a joint and common interest.¹⁶

A bill to avoid a multiplicity of suits is an exception to the general rule against multifariousness. The rule itself is no hard and fast rule. It rests somewhat upon the discretion of the court, depending upon considerations of convenience to the court, avoidance of a multiplicity of suits, and avoidance of hardship to the parties.¹⁷

The objection of multifariousness is waived by answering and submitting to trial on the merits.¹⁸

16—*Metcalf v. Cady*, 90 Mass. 587; *Walker v. Powers*, 104 U. S. 245; *Story's Eq. Pl. Sec.* 271; *Gage v. Parker*, 103 Ill. 528.

E. P.—4

17—U. S. Eq. Rule 26.

18—*Bird v. Bird*, 218 Ill. 158.

§ 74. **Impertinence.** A bill must not contain impertinent matter. Impertinent matter is that which is wholly irrelevant and unnecessary, and thus tends to make the record improperly voluminous and expensive.¹⁹

§ 75. **Scandal.** A bill should not contain scandalous matter. Scandalous matter is irrelevant or impertinent matter which is also libelous or defamatory in character. In order to be objectionable the matter must be irrelevant as well as scandalous, for it may often be necessary, in case of fraud, to make allegations very injurious to the character of the parties concerned; "nothing which is positively relevant to the merits of the cause, however harsh or gross the charge may be, can be correctly treated as scandalous."²⁰

The objection that a bill is impertinent or scandalous, is made by exceptions in writing which point out the scandalous matter. The objection is not made by filing a demurrer. These exceptions are filed to the bill, and state what parts are objected to on these grounds."²¹ When such objection is made the court refers the matter to a master in chancery for investigation, and if the charge is sustained, impertinent and scandalous matter is ordered to be stricken out and the plaintiff will be required to pay costs. If the scandal is gross and wanton, the counsel who is guilty of it may also be subject to the discipline of the court for a violation of his duty as an officer of the court. Any unnecessary allegation bearing cruelly upon the moral character of an individual is scandalous. Neither suitors nor solicitors should be allowed to manifest their personal feelings upon the records of the court.²²

In the federal practice the right to except to pleadings

19—*Woods v. Morrell*, 1 Johns. Ch. 103.

20—Story's Eq. Pl. Sec. 269.

21—*Stirratt v. Excelsior Mfg. Co.*, 44 Fed. Rep. 142.

22—*Coffin v. Cooper*, 6 Ves. 514.

for scandal or for impertinence does not obtain, but the court may itself or upon motion, strike out any redundant, impertinent or scandalous matter.²³

23—U. S. Eq. Rule 21.

CHAPTER VII

Bills not Original

§ 76. **Supplemental bills.** A supplemental bill is one brought by the plaintiff in the original suit to introduce some material fact affecting the case which has occurred since the beginning of the suit; or to introduce some new party who has become necessary since the beginning of the suit.¹ If the original bill shows no ground for relief, the defect cannot be cured by a supplemental bill setting up matters that have arisen since the commencement of the suit.²

Matters which occurred prior to the filing of the bill and not stated therein should be brought into the suit by amendment to the bill; but matters arising subsequent to the filing of the original bill must be introduced by a supplemental bill. The supplemental bill must be germane to the original bill.

In federal practice, upon the application of either party the court may permit him to file a supplemental pleading alleging material facts occurring after his former pleading, or of which he was ignorant when it was made.^{2a}

§ 77. **Bills of revivor.** A bill of revivor is the old mode of reviving a suit which otherwise would abate by the death of the plaintiff or the defendant.³ In many states a bill to revive on account of death is not necessary, it being provided by statute, that representatives of deceased parties may be made parties by suggesting the

¹—Wilder v. Keeler, 3 Paige Ch. 164.

^{2a}—U. S. Eq. Rule 34.

³—Bowie v. Minter, 2 Ala. 406.

²—Hughes v. Carne 135 Ill. 519.

deaths and the names of the representatives of the deceased, upon the records of the court, when the case will proceed as in other cases. In the federal courts, in the event of the death of either party, the court may, in a proper case, upon motion, order the suit to be revived by the substitution of the proper parties.^{3a}

§ 78. Bill of review.^{3b} A bill of review is in the nature of a writ of error, and its object is to procure an examination, or modification, or reversal, of a decree rendered upon a former bill. It lies only after the term of court, at which the final decree was entered, has expired. Until the term has passed, a court of chancery has full power over all the proceedings in the case, and can alter or annul any decree or order and can, *on mere motion rehear the case*, if it thinks proper to do so. A bill of review must be brought in the same court in which the final decree in the original suit was passed. Leave of court must be obtained before a bill of review can be filed. It lies for error apparent on the record, or for material evidence not known in time for its use at the former trial and not discoverable by reasonable diligence at that time. It is proper after the term a decree is enrolled.

A bill of review, for error apparent on the face of the record, must be for an error in law, arising out of the facts admitted by the pleadings or recited in the decree itself, as settled, declared, or allowed, by the court. It cannot be sustained upon the ground that the court has decided wrongfully upon a question of fact; but if there has been an erroneous application of law to the facts found by a decree, the court may review, or reverse the decree, upon a bill of review. Errors of law, against which relief can be had by a bill of review, must be such as arise rather from obvious mistake or inadvertence, appearing on the face of the decree, or at least of record,

3a—U. S. Eq. Rule 45.

3b—Shiras Eq. Prac.

than from alleged error in the deliberate judgment of the chancellor on a debatable question of law or equitable right.⁴ It cannot be brought upon the ground that the former decree was not supported by the evidence,⁵ and no evidence is admissible as to the facts established by the original decree. The error must appear on the face of the pleadings and decree, for the evidence in the case at large cannot be looked into, to ascertain whether the court misunderstood the facts. That is the proper province of the court of appeal. But, taking the facts to be as they are stated to be on the face of the decree, it must appear that the court has erred in point of law.

Upon a bill of review a court will revise, correct, or reverse, its own decree, for an erroneous application of law to the facts found, whenever a court of appeals would do so for the same cause.

§ 79. **Bill of review like a petition for rehearing.** The only distinction between a petition for a rehearing in chancery, and a bill of review for the same cause, is, that the former is to be invoked before the enrollment of the decree and the adjournment of the term, while the latter is available after the decree and adjournment of the term. In the federal courts if no appeal lies from the decree, then a petition for rehearing may be filed during the next term after decree.

§ 80. **Cross-bill.** A cross-bill is one brought by a defendant against the complainant in the same suit, or against other defendants, or against both, concerning the matters in question in the original bill, for the purpose of obtaining discovery, or for affirmative relief. As a rule defendant must answer before filing his cross-bill.

Under an original bill the court must simply grant or deny the relief asked for by the plaintiff. As a rule it

⁴—*Caller v. Shields*, 2 Stewart & Port. 417.

⁵—*Whiting v. Bank*, 13 Pet. 6.

cannot proceed, after denying relief to the plaintiff, to give any specific relief to the defendant, although the justice of the case might manifestly require it. The main purpose of a cross-bill by defendant is to ask for such relief as the case may show him to be entitled to, unless upon the original bill the court can proceed to give defendant the proper relief.⁶

It is unnecessary to file a cross-bill where (on the failure of a bill for specific performance) it appears that earnest-money has been paid by the defendant; and a decree for the repayment of the earnest-money will be given without the filing of a cross-bill;⁷ also, upon a bill for an accounting, the party against whom the balance is found will be decreed to pay it without a cross-bill.⁸

Where the matter of a cross-bill constitutes a defense, and at the same time entitles defendant to relief beyond the dismissal of the bill, and such relief cannot be had by answer, a cross-bill is proper.⁹ A cross-bill seeks and secures relief to the defendant, beyond a mere successful defense.^{9a}

In the federal courts, a cross-bill is unnecessary to state a counter-claim or to state a set-off. There the answer must state in short and simple form any counter-claim arising out of the transaction which is the subject-matter of the suit, and the answer may without cross-bill, set forth any set-off or counter-claim against the plaintiff which might be the subject of an independent suit in equity against him, and the court may thereupon grant affirmative relief.^{9b}

§ 81. Cross-bill must be germane. A cross-bill must contain matter germane to the original bill and must not

6—Shields v. Bush, 189 Ill. 534.

7—Adams v. Valentine, 33 Fed.

Rep. 1.

8—Acme v. McLure, 41 Ill. App.

397.

9—Paxton v. Stackhouse, 4 Kulp. (Pa.) 403.

9a—Wileox v. Allen, 36 Mich. 160.

9b—U. S. Eq. Rule 30.

contradict allegations in the answer filed by the same party.

§ 82. **Cross-bill to aver defense arising after bill filed.** A defendant, to take advantage of a defense arising *pendente lite*, must assert it in the form of a cross-bill praying a dismissal of the original; this procedure taking the place of a plea *puis darrein continuance* (a plea filed after issue joined), at common law.¹⁰ By strict practice, this course must also be taken where the defense affects only a co-defendant.¹¹

In the federal practice such a defense may be set forth in a supplemental pleading.^{11a}

§ 83. **Cross-bill unnecessary if answer attains relief.** In some states defendants claiming liens, as in a foreclosure suit, need not file cross-bills to have the court determine their rights to share in the surplus proceeds of sale. Such rights may be determined upon answers setting them forth,¹² whether such liens are junior mortgage liens, judgment liens, mechanic's liens, or otherwise. In these jurisdictions defendants are entitled, without filing a cross-bill, to have the court determine the existence and priority of such liens, and to order the premises sold for the benefit of complainant, and the proceeds of sale, after being applied to plaintiff's debt, to be distributed among defendant lienors according to the priority of their liens. But a cross-bill is necessary, if a junior lienor desires affirmative relief beyond merely sharing in the surplus proceeds of sale, such as a clause in the decree, ordering a sale for his benefit, too, if his debt is not also paid by a short day, as well as the debt of complainant.

In the federal practice the defendant must in his an-

10—Mills v. Larrenee, 186 Ill. 635.

11a—U. S. Eq. Rule 34.

11—Metropolis National Bank v. Sprague, 21 N. J. Eq. 530.

12—Gouwens v. Gouwens, 222 Ill. 223; 78 N. E. 597.

swer, without cross-bill, set forth any set-off, or any counter-claim, which might be the subject of an independent suit against the plaintiff, and such answer has the same effect as a cross-suit.^{12a}

§ 84. Defendants to cross-bill. A cross-bill requires the same parties defendant as would an original bill for the same purpose. Whether the cross-bill must fail if all necessary parties to it are not already parties to the original suit, or whether new and necessary parties may be brought in on the cross-bill, is a question upon which the practice is not uniform. In some jurisdictions it is held that new parties cannot be introduced by a cross-bill;¹³ in others the practice of bringing in new parties is provided for by statute.¹⁴ Plaintiff in the original bill should be a necessary defendant in a cross-bill, although it be directed mainly against a co-defendant; because a controversy between defendants cannot be made the ground of a cross-bill, unless its settlement is necessary to a complete decree on the case made by the bill.¹⁵

§ 85. Form of cross-bill. A cross-bill must have all the essential parts of an original bill. It must be so framed that both original and cross causes may be heard together, and a single decree entered.¹⁶ Formerly a cross-bill, in addition to having all the parts of an original bill for the same purpose, stated so much of the original bill, as to show its parties, scope and object, and what proceedings had been had thereon.¹⁷ But this requirement was due to the fact that a cross-bill in England might be filed in a court other than the one in which the original suit was pending. In the federal courts and in most states a cross-bill must be filed in the same court as the

12a—U. S. Eq. Rule 30.

13—Wright v. Frank, 61 Miss. 32; Shields v. Barrow, 17 Howard 130.

14—Ill. Statutes, Chan.

15—Weaver v. Alter, 3 Woods, 152.

16—McDougald v. Dougherty, 14 Ga. 674.

17—Mitford Eq. Pl. 75.

original; and it is necessary to set forth only so much of the original bill and the proceedings thereon as may be necessary to explain the right sought to be brought before the court.¹⁸

§ 86. **Pleading to cross-bill.** A defendant to both original and cross-bill must interpose his defense separately to each.¹⁹ The modes and grounds of defense are substantially the same as to an original bill.

In the federal practice, a cross-claim in an answer is put in issue by a special reply,¹⁹ which must be filed within ten days after answer filed.

§ 87. **Bills to impeach or suspend a decree, or to carry a decree into effect.** Fraud in procuring a decree is the usual ground for impeaching and setting the decree aside, and a bill is proper for the purpose even after the term has passed in which the decree was entered. After hearing and decree, certain circumstances, such as newly discovered evidence, will justify a bill to suspend a decree. Circumstances requiring further orders of the court to carry a prior decree into effect, may be brought to the attention of the court by a bill to carry into effect the prior decree.

18—Neal v. Foster, 34 Fed. 496.

19—U. S. Eq. Rule 31.

Bills not Original

<p>1. Supplemental Bills.</p>	<p>Bills correcting some defect in the suit resulting from facts occurring or discovered after original bill is filed.</p>
<p>2. Cross-Bills.</p>	<p>Bill filed by defendant in original suit to obtain affirmative relief in the same suit. In federal courts such relief may be obtained by setting forth the facts in an answer.</p>
<p>3. Bill to impeach decree.</p>	<p>For fraud in obtaining decree.</p>
<p>4. To suspend a decree.</p>	<p>For special reasons.</p>
<p>5. To carry decree into effect.</p>	<p>When for some reason it is impossible without the further order of the court.</p>
<p>6. Bill of Revivor.</p>	<p>Bill to revive the original suit when from some cause—as the death of a party—the suit would abate.</p>
<p>7. Bills of Review.</p>	<p> 1. For error in law. 2. For new matter discovered after decree, which with diligence could not have been discovered before. </p>

Bills not original.

CHAPTER VIII

Demurrers

§ 88. **Defenses and defensive pleadings.** There are five general grounds of defense: (1) Defect of jurisdiction, (2) Defect as to parties, (3) Defect in the frame or form of the bill, (4) Defect of remedy (suit barred), (5) Defect of merits in the facts of the case. These defenses question the competency of the court, of the parties, of the bill, of the remedy, of the merits. There are only three methods, or pleadings in defense, by which these defenses can be brought before the court: (1) By demurrer, (2) By plea, (3) By answer. A demurrer, by saying that no proper case is stated in the bill, aims to escape any answer or trial; a plea aims to escape answer by proposing a trial upon the truth of only one disputed question of fact as a defense; an answer, answers every allegation of the bill, and also distinctly sets forth each different ground of defense, and proposes a trial upon all disputed allegations. It remains to discuss these three defensive pleadings in their order.

§ 89. **Nature of a demurrer.** The function of a pleading is to plead facts in a logical manner, to assert facts, to deny facts, to admit facts. Bills, pleas, answers, replications, disclaimers, are typical pleadings. A demurrer is not typical, but is a pleading so-called. Strictly speaking, a demurrer is only a written criticism or objection to some other pleading. In equity courts defendant "demurs" to the bill to have the court determine, whether upon the facts as stated in the bill, plaintiff is entitled

Table of Defenses to Actions

1. Incompetency of Court	{ Lack of jurisdiction over subject matter. { Lack of jurisdiction over parties.
2. Incompetency of Parties	{ Want of capacity to sue or to be sued. { Non-joinder of indispensable party. { Mis-joinder of unnecessary and improper party.
3. Incompetency of Bill	{ Defect or omission of necessary part of bill. { Defect or omission of affidavit to bill. { Defect or omission of signature to bill. { Multifariousness or mis-joinder of actions. { Defective otherwise in frame or form.
4. Incompetency of Remedy	{ Remedy barred by statute of limitation. { Remedy barred by statute of frauds. { Remedy barred by <i>laches</i> (neglect to sue). { Remedy barred by release of claim. { Remedy barred by former judgment (<i>res adjudicata</i>). { Remedy barred by another suit pending for same matter.
5. Incompetency of Merits	{ Lack of merit (want of equity) in the facts of the case.

to any relief in an equity court, or whether defendant is required to answer.

§ 90. **Demurrer raises a question of law.** It is always a question of law for the court to decide, whether, and to what extent, a bill is defective; and so it is said *a demurrer always raises a question of law*. It is the function of a plea, or of an answer, to raise a question of fact against the allegations in the bill.

§ 91. **Demurrer applies only to bill.** In equity courts, unlike common law courts, the word "demurrer" is restricted to apply only to a demurrer to a bill. Objections or criticism of the plea as constituting a defense,¹ or of an answer as constituting a defense,² are not filed in written form at all, and are not called demurrers. If a plea is thought by complainant to be insufficient to constitute a valid defense, he cannot demur; he moves the court "to set the cause down for argument as to the sufficiency of the plea on file;" and if a complainant thinks an answer does not constitute a valid defense, he cannot demur; he moves the court "to set the cause down for hearing upon the bill and answer." If complainant objects that defendant in his answer has given insufficient discovery in answer to the allegations of the bill, he expresses his objection, not by demurrer, but by filing "exceptions" in writing, pointing out what allegations are not answered. If either party wishes to object or to criticise the opposite pleading, for containing impertinent or scandalous allegations, he does not demur, but files written "exceptions," which point out such allegations.

§ 92. **Demurrer defined.** Thus in equity a "demurrer" can be to the bill only. It may be defined as an objection to the bill, for deficiencies in its form, or in its statements, which deficiencies are apparent from the bill

1—*Travers v. Ross*, 14 N. J. Eq. 254.

2—*Stokes v. Farnsworth*, 99 Fed. 836.

itself, even assuming all its statements to be true, but not assuming as true any facts not stated in the bill.³

In federal equity practice, the so-called "demurrer" is abolished. But its function is not abolished; there, all demurrable objections to a bill must be presented to the attention of the court in the form of a motion to dismiss the bill, or the objection must be stated as a part of the answer to the bill; and such objection in an answer may be disposed of before final hearing in the discretion of the court. A motion to dismiss may be set for hearing by either party upon five days' notice.⁴

§ 93. **Function or use of demurrer.** A demurrer, after mentioning either some general or special ground of objection, prays the court to dismiss the demurring defendant, and to excuse him from answering the bill. Thus a demurrer always delays a full and general answer to the bill; and if sustained by the court defendant avoids answering. If the defects of stating a cause of action are material, and if the true facts of the controversy are such that a better case cannot be stated, even if amendment be allowed, then a demurrer will end the suit; and the trouble of answering fully, and the expense of a trial or hearing, is thus avoided. Defects which are merely formal or immaterial are waived by omitting to demur, and some material defects are thus waived.⁵ But material defects, such as entire want of jurisdiction over the subject-matter or over the parties, are not waived by omitting to demur. If defendant feels sure his demurrer is based upon material defects, and desires to risk his entire defense upon the demurrer, he "abides by" his demurrer, if overruled upon argument in the court below; he omits then to answer further, and a decree is entered, and later the decision of the demurrer by a higher court upon appeal from this decree, ends the case.

3—2 Dan. 20.

4—U. S. Eq. Rule 29.

5—Law v. Ware, 238 Ill. 360;
Richards v. Ry. Co., 124 Ill. 516.

§ 94. **Forms of demurrer.** As to their *forms*, demurrers are classed as general demurrers, special demurrers, and demurrers *ore tenus* (oral demurrers).

§ 95. **General demurrer.** A demurrer will not be good if it merely says that defendant “demurs to the bill.” It must express some ground of demurrer, either *general* or *special*. A defendant is said to demur *generally* when he demurs to the *jurisdiction* of any equity court over the subject-matter of the bill, or to the lack of *substance* or merits of the bill, in other words, “for want of equity” in the nature of the subject-matter stated, or in the merits of the facts stated; he is said to demur *speciallly* when he demurs for any defects, other than for “want of equity.”

§ 96. **Special demurrer.** A special demurrer, as a rule, must specify and point out the defects or omission.⁶ A demurrer for want of equity, may, but is not required to specify the particular grounds of demurrer, beyond the general statement, that “there is no equity shown by the bill.” Thus, a demurrer for non-joinder or misjoinder of the parties must specify who are the necessary parties; and a demurrer for multifariousness should specify not simply that the bill is multifarious, but that it unites distinct and separate claims in one suit, and the demurrer should further show the inconvenience that will result from so doing.⁷

§ 96A. **Distinction between general and special demurrers.** Where the facts alleged fail substantially to make out a case in equity, the demurrer may be generally stated, to be upon the ground of “want of equity;” but when the demurrer is upon any other ground such as defect of jurisdiction over parties, defect of parties, de-

⁶—2 Dan. 71.

⁷—2 Dan. 71.

fect of bill, defect of remedy (such as suit barred by *laches*, or by statutes of limitations, frauds, usury, etc.), then such grounds of demurrer must be expressly pointed out.⁸ Therefore for all dilatory defects, the ground of demurrer must be specially pointed out, as well as for formal defects.⁹

§ 96B. **Oral demurrers, (*ore tenus*).** A defendant may, even at the hearing of arguments on his demurrer, orally assign other grounds of demurrer in addition to, and different from, the grounds mentioned therein. This is called demurring *ore tenus*, orally, and even if the grounds mentioned in the written demurrer are held invalid, the oral grounds, if held valid, will support the written demurrer filed, and sustain the same. A defendant may assign as many causes of demurrer as he pleases, but a demurrer *ore tenus*, must be co-extensive with the demurrer on file. That is, if the demurrer filed is to a part of the bill, an *ore tenus* ground of demurrer must also be to that same part, and cannot go to the whole bill.¹⁰

§ 97. **Advisable to file general and special demurrer.** The safe practice for one who demurs, is always to demur generally, that is "for want of equity," and also again in the same pleading to demur specially, upon a specified ground, because then at the hearing upon such demurrer, still other grounds of demurrer, to the whole or part of the bill, can be assigned *ore tenus*, orally. If only a special demurrer, to a part of the bill were used, an *ore tenus* ground would be limited to apply to the same part.

Even in the federal practice, where demurrers must be made in the form of a motion to dismiss, or be set forth in an answer, fairness requires that the grounds for the demurrer be set forth as notice to the adverse party.

8—*Borders v. Murphy*, 78 Ill. 81.

10—2 Dan. 71, 72.

9—*Day v. Cole*, 56 Mich. 295.

E. P.—5

§ 98. **Grounds of demurrer.** As to their grounds, demurrers to the relief are classed as:

1. Demurrers as to the jurisdiction of the court, over the subject matter, or over the parties.

2. Demurrers as to the parties, for nonjoinder, misjoinder or want of capacity.

3. Demurrers as to the frame or form of the bill, such as for multifariousness, omission of parts of the bill, omission of affidavit, omission of signature, etc.

4. Demurrer as to remedy, or in bar of suit, by Statute of Limitation, Statute of Fraud, *Res adjudicata*, other suit pending, *Laches*, Release.

5. Demurrer as to the merits; want of equity in the case stated.

§ 99. **General grounds easily suggest the particular grounds.** The grounds of demurrer are easily suggested from the author's classification of defenses to actions. The table on the following page should be mastered by all students of pleading.

§ 100. **What is conceded upon demurrer.** In hearing a demurrer, the argument is strictly confined to the case as stated in the bill; and all matters well pleaded in the bill are deemed to be true.¹¹ But where a bill avers any fact falsely and contrary to what the court is presumed to know as matter of judicial notice, such averment, upon arguing a demurrer to the bill, is considered a nullity.¹² And a demurrer does not concede any matter of law which may be suggested in the bill, or may be inferred from the facts stated in the bill;¹³ nor any fact that is not specifically alleged;¹⁴ nor allegations "that complainant is informed and believes that"¹⁵ but

11—East India Co. v. Hinchman,
1 Vesey, Jr. 289.

12—2 Dan. 23.

13—Dillon v. Barnard, 21 Wall.

430.

14—Am. Loan & Trust Co. v. R.
R. Co., 157 Ill. 641.

15—Murphy v. Murphy, 189 Ill.

360.

Different Grounds of Demurrer

<p>1. Defect of jurisdiction.</p>	<p>1. Bill discloses a case or subject-matter for relief not within the jurisdiction of an equity court, but discloses a case for relief in a Common Law Court, in a Probate Court, in an U. S. Bankruptcy Court, in a U. S. Admiralty Court, in a Foreign Court, or in the territorial jurisdiction of this equity court.</p> <p>2. Bill discloses a domicile, residence or citizenship of an indispensable party as not within the territorial jurisdiction of this equity court.</p> <p>1. Bill discloses personal disability of complainant to sue by reason of coverture, infancy, idiocy or lunacy, without representation by husband, guardian, next friend, conservator; or by reason of bankruptcy, trusteeship, or receivership, without representation by trustee in bankruptcy or by trustee or receiver.</p> <p>2. Bill discloses lack, or defect, of appointment to character in which complainant sues, such as one acting as administrator without appointment.</p> <p>3. Bill discloses non-joinder of necessary party.</p> <p>4. Bill discloses misjoinder of unnecessary party.</p>	<p>1. For dilatory defects.</p>
<p>2. Defect of parties.</p>	<p>1. Bill discloses multifariousness.</p> <p>2. Bill discloses whole subject matter not covered, (multiplicity of suits).</p> <p>3. Bill omits signature of counsel, omits prayer for process, omits verification under oath when requisite, or omits other necessary parts of bill.</p> <p>4. Bill discloses that allegations in bill are vague and uncertain.</p>	<p>2. For permanent defects.</p>
<p>3. Defect of frame or form of bill.</p>	<p>1. Bill discloses bar by statute of limitations, or by statute of frauds, or by statute of usury, or by other statutes.</p> <p>2. Bill discloses bar by court record of prior judgment or decree, or by discharge in bankruptcy, or by another suit pending for same matter in same domestic jurisdiction.</p> <p>3. Bill discloses bar by laches.</p> <p>4. Bill discloses bar by release.</p> <p>5. Bill discloses bar by account stated or account settled (against bill for accounting).</p> <p>6. Bill discloses bar by arbitration and award.</p>	
<p>4. Defect of remedy, (substance, or bar of suit).</p>	<p>1. Bill discloses plaintiff has no interest in subject-matter.</p> <p>2. Bill discloses that the plaintiff has an interest but defendant is not answerable to him but to some other person.</p> <p>3. Bill discloses that the defendant has no interest in subject-matter.</p> <p>4. Bill discloses that plaintiff is not entitled to the relief prayed.</p> <p>5. Bill discloses that value of subject-matter too small.</p> <p>6. Bill discloses that suit is prematurely begun.</p> <p>7. Bill discloses that defendant is a purchaser for valuable consideration without notice of plaintiff's rights.</p> <p>8. Bill discloses no cause of action which merits relief in any court, equity or law.</p>	
<p>5. Defect of merits, (substance or want of equity) 2 Dan. 35.</p>		
<p>1. Demurrer to Relief.</p>	<p>2. Demurrer to Discovery.</p>	

positive allegations “that complainant is informed, and believes, and therefore states the fact to be that”—, are conceded.¹⁶

§ 101. **A speaking demurrer.** A demurrer cannot invoke in its support any fact whatever which is not contained in the bill,¹⁷ except those facts of which the court takes judicial notice.¹⁸ When the demurrer depends upon some fact not appearing in the bill, it is called a *speaking demurrer*, and will be overruled. It is the function of a *plea or answer* to expressly set forth defensive facts not appearing in the bill. A demurrer cannot do so, either expressly or in argument.

§ 102. **How demurrer may be waived.** A defendant who does not bring his demurrer to a hearing thereby waives it.¹⁹ A defendant who files his plea, or answer, after his demurrer has been overruled (unless the answer specifically mentions a ground of demurrer and reserves the demurrer as a defense), thereby waives the right to assign the overruling of his demurrer as error, and thus he waives the demurrer, unless the bill fails to set forth a cause of action, or unless the case presents jurisdictional defects.²⁰

§ 103. **Effect of sustaining a demurrer.** A demurrer to the whole bill, if sustained, results in a decree dismissing the bill, unless the court can see that the defects of the bill can be cured by amendment, in which case leave to amend will be given. If leave to amend is not requested the bill is dismissed.

§ 104. **Effect of overruling a demurrer.** If a demurrer is overruled, the defendant who demurred is ruled to

16—Bromley Carpet Co. v. Field,
88 Ill. App. 228.

17—Story, Sec. 448.

18—2 Dan. 23-72.

19—Long v. Fox, 100 Ill. 43.

20—Baumgartner v. Brandt, 207
Ill. 345; Cline v. Cline, 204 Ill. 130.

answer. If he does not answer, the bill is taken as confessed. An order overruling a demurrer is not a final order; it merely determines there is sufficient equity stated in the bill to require an answer.

CHAPTER IX

Pleas

§ 105. **Plea defined.** A plea is a short pleading of a single defense, instead of an answer with full discovery besides defenses. A plea *either affirms* against the bill, a single matter of fact as a defense, *or it denies* a single essential matter of fact alleged in the bill, *or it both affirms* a defense anticipated by the bill *and denies* the statements in the bill impeaching such expected defense. The defense raised by a plea, may be a dilatory defense, which abates, defeats, that particular court action only; or it may be a defense in bar of any suit, or one which upon the merits ends the controversy for all time. Thus, a plea always delays, and if successful, avoids, a full answer to the bill.

§ 106. **Plea and demurrer compared; function of a plea.** A demurrer asserts that the facts in the bill even if true, as stated, do not constitute a correct, lawful case. A plea asserts that the true facts, in at least one respect, are not fairly stated in the bill. The main purpose of a plea in chancery, is to save the delay and expense of going into the case at large when some defensive ground of fact exists, which when proved to the court, will either abate the suit, or bar recovery therein. It saves defendant from the difficult, tedious, and self-betraying answer in chancery. Unlike an answer, a plea *admits* all allegations in the bill which are not expressly denied in the plea.¹

¹—McCloskey v. Barr, 38 Fed. 165.

§ 107. **Forms of pleas.** According to manner and form of statement, pleas are denominated as:

(1) **PURE OR AFFIRMATIVE PLEAS**, which affirm or allege as a single ground of defense, new matters of fact by way of confession and avoidance. For example, a plea of the facts showing that plaintiff has given a release of the claim.²

(2) **NEGATIVE PLEAS**, which negative (deny), a single essential allegation of fact appearing in the bill.³

For example, a plea denying that complainant "resided in said state one year before filing his bill of complaint" (where such residence is alleged in the bill, and is required by statute); or a plea denying that complainant is the legal or equitable owner of the real estate as stated in the bill, and which is the subject-matter of the suit; or a plea denying any other fact necessary to establish complainant's case.

(3) **ANOMALOUS PLEAS**, (affirmative and negative pleas), which *affirm* the defense anticipated by the bill, and *negative* the allegations in the bill which would vitiate the expected defense.

For example, where the bill charges that the expected defense of the statute of limitations is avoided by the defendant's renewed promise to pay; then if defendant wishes to file a plea making this expected defense, his plea **must** nevertheless *affirmatively set forth* the statute of limitations, and *expressly deny* making any new promise to pay, at any time since the time the statute became a bar to the claim. Because, expressly asserting the statute, and expressly denying the alleged new promise to pay, are both necessary to make a single complete defense to such allegations in a bill; and because, *unlike an answer, a plea is deemed to admit every allegation of*

2—Story Eq. Pl. 660.

3—2 Daniell Ch. Pr. 98.

*the bill unless expressly denied in the plea.*⁴ Defenses such as *laches*, statute of limitations, and statute of frauds, are in some jurisdictions, deemed to be waived unless the pleader expressly sets them forth in his demurrer, or in his plea, or in his answer.⁵

Moreover, in anomalous pleas, *the affirming* of the expected defense, *and the denial* of the statements in the bill impeaching that defense, should both appear in two places, (1) among the general averments, constituting the formal body of the plea itself, and (2) as a part of an "answer in support" of such a plea. Charges in a bill impeaching an anticipated defense always compel the defendant to file with a plea a "supporting answer" giving discovery in answer to each and all evidential facts and statements in the bill impeaching the good faith and truth of such expected defense; thus it is seen that an anomalous plea is also always "a plea supported by answer." Though contained in a single pleading, the body of the plea, and the accompanying answer are distinct and separate parts; and the body of an anomalous plea, should both affirm the defense and deny the impeaching charges, independently of the denials to the bill also particularly set forth in the accompanying supporting answer.⁶

§ 108. **Pleas supported by answer.** If defendant files a good plea, he always saves himself from a general and full answer to the bill. But sometimes even a plea is required to include a short answer. If a plea sets up a defensive ground of fact, regarding which the bill has charged particular evidential facts and circumstances, as avoiding and impeaching such expected defense, then the plea, whether an affirmative plea, or a negative plea, or an anomalous plea, must also be accompanied by so

4—McCloskey v. Barr, 38 Fed. 165, 171.

6—Allen v. Randolph, 4 Johns. Ch. N. Y. 693.

5—Fletcher Eq. Pl. Sec. 275.

much of an answer to the bill, as will give discovery in answer to these impeaching evidential facts and circumstances in the bill bearing on the defense pleaded.

§ 109. Answer in support carefully limited. Care must be taken that such answer in support of a plea does not answer the bill beyond the defensive ground of facts covered by the plea, nor beyond matters strictly responsive to the allegations, charges, or interrogatories, on that subject in the bill; because in some states an unnecessary answer, with or after a plea, overrules, waives, a plea.

§ 109A. Grounds of pleas. As to their grounds, pleas are classed as:

1. Pleas to the jurisdiction of the court, over the subject matter, or over the parties.
2. Pleas as to the parties, for non-joinder, misjoinder, or want of capacity.
3. Pleas in bar of the remedy, by statute of limitation, statute of frauds, *res adjudicata*, another suit pending, laches, release.
4. Pleas to the merits, or facts showing the true merits are not as stated in the bill and are in favor of defendant.

These general grounds easily suggest themselves from the author's classification of defenses to actions. The first two classes are also known as pleas dilatory or in abatement, and the last two, as pleas in bar or to the merits. The table on the following page should be memorized to obtain a ready comprehension of pleas.

§ 110. Pleas to jurisdiction must give better jurisdiction. Pleas to the jurisdiction must show what court has proper jurisdiction to give a complete remedy.⁷ Pleas as to defects as to parties, must point out the proper parties.

7—2 Dan. 139.

Different Grounds of Pleas

PLEAS

1. To the jurisdiction.	Denials or new facts showing: 1. That the case stated is one not recognized by equity courts but by a common law court, a probate court, a federal bankruptcy court, etc. 2. That the domicile, residence, or citizenship of the parties is not as stated in the bill, and the true citizenship stated ousts the court of jurisdiction.	1. Pleas Dilatory or in abatement.
2. To the parties.	Denials or new facts showing: 1. The personal disability or incapacity of complainant to sue by reason of coverture, infancy, idioy or lunacy, undischarged bankruptcy, or non-appointment to official capacity. 2. Defendant not the person alleged, or does not possess the official capacity alleged (is not an administrator, for example). 3. Nonjoinder of necessary party. 4. Misjoinder of unnecessary party.	2. Pleas Peremptory or in bar.
3. Pleas in bar, to the remedy.	Denials or new facts showing. 1. Bar of suit by Statute of Limitations, Statute of Fraud, Statute of Usury. 2. Bar by court record of prior judgment, or decree or discharge in bankruptcy, another suit pending in same jurisdiction. 3. Bar by laches. 4. Bar by release. 5. Bar by account stated or account settled (against bill for accounting). 6. Bar by arbitration and award.	
4. Pleas to the Merits.	Denials or new facts showing: 1. Defendant is a purchaser for a valuable consideration without notice of complainant's rights 2. Or showing that the facts are different from those alleged, and upon their true merits do not constitute any cause of action in any court, equity or law (2 Dan. 138).	

§ 111. In federal courts the separate plea is abolished.

In the federal practice, the separate pleading known as a plea, is abolished, and every defense heretofore presentable by plea must be made in the answer, and may be separately heard and disposed of before the trial of the principal case in the discretion of the court.⁸

§ 112. Testing the legal sufficiency of a plea. A plea in equity is not spoken of as being demurrable, the word, demurrer being limited to apply to demurrers to bills. If complainant thinks a plea filed, does not set forth a good defense in equity, he does not "demur;" he moves the court to "set the cause down for hearing, as to the sufficiency of the plea." When thus set down for argument, the truth of the facts stated in the plea is conceded for the time being. If the plea is adjudged good, the plaintiff must then take issue upon the plea by filing a replication to it. If the plea is adjudged bad, the defendant will then still be allowed to file an answer to the bill.⁹

In the federal practice, the logical sufficiency of a plea, as set forth in an answer, may be tested by a motion to strike out.¹⁰

§ 113. Trial of case upon plea and replication. If the plaintiff takes issue on a plea, by filing a replication to it, he thereby admits its sufficiency as a pleading to his bill; and the only question then open is the truth of the facts in the plea, which will be determined by trial and evidence.¹¹ Upon trial and evidence, the decision of the court depends upon the nature and extent of the issues and defense made by the plea; as a rule the plea ends the suit.

In the federal practice the function and effect of a plea for many years has been obscured if not destroyed by the federal courts' interpretation of old rules 33 and 34.

8—U. S. Eq. Rule 29.

10—U. S. Eq. Rule 33.

9—Rhode Island v. Mass., 14 Peters 210.

11—Bean v. Clark, 30 Fed. Rep. 225.

Upon trial and evidence upon a plea, if the finding was for the defendant, it availed him; but if the finding was for the plaintiff, the only effect in any event was that defendant must be allowed to answer over.¹² Thus the plea in the federal courts was a sure instrument of delay for the defendant and was of no avail to plaintiff. It may be for this reason that new federal rule 29 abolishes the separate plea and makes it presentable only by answer. The chief function of a plea is to avoid the long and difficult answer as well as the long trial thereon, by presenting instead of an answer, a single complete defense of fact by way of a separate plea and trial thereon. A plea, being simply one of the complete defenses to an entire suit, could always in regular chancery practice, be set forth with other defenses, in an answer; and it always was proper to try a plea before trial of the other issues made by an answer. The plea and the demurrer are more useful as separate pleadings, than as part of an answer which might be unnecessary.

§ 114. Pleas verified. Where a plea is accompanied by answer, it must be put in upon oath. Pleas in bar by matter of fact, must be verified upon oath.

§ 115. Plea may be waived. A plea is waived by going to answer and hearing on the general merits of the cause.¹³

¹²—*Westervelt v. Library Bureau*, 118 Fed. 824; *Dalzell v. Duober Mfg. Co.*, 149 U. S. 315; *Farley v. Kittson*, 120 U. S. 303; *Old U. S. Eq. Rules 33 and 34.*

¹³—*Miller v. Perks*, 63 Ill. App. 140.

CHAPTER X

Disclaimer

§ 116. A disclaimer is a pleading whereby a defendant denies that he has or claims any right to the thing in demand, and renounces all claim thereto. It is available only to a defendant charged merely with having an interest in the subject-matter and not with a liability connected therewith. One cannot disclaim where he is charged with fraud or where a liability for costs remains. If defendant once had an interest with which he has parted, an answer is required to show plaintiff whom to make proper parties. Plaintiff may except to an improper disclaimer in the same manner as to an answer. In form a disclaimer begins and ends like an answer.

A defendant cannot by a disclaimer prevent plaintiff from obtaining an answer from him, unless it is clear from the allegations in the bill, and from the statements in the disclaimer, that the defendant ought not after the disclaimer as made, be retained as a party to the suit.¹ A disclaimer must be full and explicit, and be accompanied by answers denying or avoiding facts in the bill which ought to be answered.²

¹—Ellsworth v. Curtis, 10 Paige
Ch. N. Y. 105.

²—Worthington v. Lee, 2 Bland.
Md. 678.

CHAPTER XI

Answer

§ 117. **The third mode of defense to a bill is by answer.** If a defendant properly served with summons, does not demur to the bill, nor file a plea to it; or if a demurrer or plea filed, has been overruled, he files an answer, or the bill will be taken as confessed.

§ 118. **Two-fold nature of answer, to give discovery, and to plead the defenses.** The answer, after answering all statements, charges, and interrogatories in the bill, should then proceed further, and make averments or denials constituting the defenses.¹ The defense may be based on mere denials of material allegations in the bill or it may consist of new facts averred, which counteract or avoid those stated in the bill. Thus an answer is always both an *answer*, giving the discovery demanded by the bill, and is also a *pleading*, showing the definite defenses.² Several defenses may be pleaded in an answer, even alternative and inconsistent defenses.^{2a} If the defense is intended to be based upon a denial merely of certain averments of the bill, then such intended denials must be explicitly stated in an answer.

§ 119. **Allegations unanswered in an answer are deemed to be denied.** In equity, upon answer filed, in most states, an allegation of the bill, unanswered by the answer, is deemed to be denied by the formal traverse at

1—Langdell 68.

2—2 Dan. 239.

2a—U. S. Eq. Rule 30.

the close of the answer, unless facts essential to the defense stated, are evaded and not covered.^{2b}

In federal practice, however, averments of the bill are deemed to be admitted by the answer unless the answer meets them.³

§ 120. **When an answer is discovery, and when, it is mere pleading.** The answers of the defendant to the statements, charges, and interrogatories of the bill, are called "discovery," and are ordinarily to be regarded as *evidence* in the case, unless a statute permits, and the bill also expressly permits an answer not under oath. If answer under oath *is thus expressly waived, then the answer, even if put in under oath, is a mere pleading, and not evidence.* But even as a mere pleading, the answer may admit, as well as deny, allegations of fact in the bill. It is always a function of any pleading, to admit facts, or to deny facts, or to assert facts, material to the controversy, for the purpose of formulating the issues for trial. If answer under oath be not waived, the answer then must be under oath, and the averments of the answer, are then regarded as evidence, equal to that of one witness, to overcome which, complainant must introduce two witnesses, or one witness, and other evidence sufficient to preponderate.

§ 121. **Answer must meet every allegation in the bill.** Whether or not the bill waives answer under oath, an answering defendant must answer every material allegation of the bill,⁴ admitting this one, denying that one, or asserting he has no knowledge or information and no belief concerning a certain allegation, he "therefore denies it, and calls for strict proof thereof:" (For example, "Defendant has no knowledge or information or belief as to whether or not complainant is the owner, etc.

2b—Higgins v. Curtiss, 82 Ill. 28.

4—2 Dan. 246.

3—U. S. Equity Rule 30.

—and therefore defendant denies that plaintiff is the owner and calls for strict proof thereof”). In the federal practice, averments of the bill, other than of value or amount of damage, if not denied, are deemed to be confessed by the answer, except as against an infant, lunatic, or other person, *non compos*, and not under guardianship.^{4a}

A defendant answering, must answer not only as to facts within his knowledge, but as to those ascertainable from books and papers in his control.⁵ He must answer each material averment directly, unambiguously, and without evasion, denying or confessing the real substance of each charge clearly.⁶ But he need not answer as to the same matter more than once, even if that matter be repeated in the charging part or in the interrogatories; and the bill cannot compel discovery of the defendant's evidence of his own defense.⁷ Complainant has a right only to discovery of evidence material to complainant's case.

§ 122. Complainant may compel full answer. In order to lessen his proofs, or in order to obtain discovery needed as a basis for his decree, complainant may compel full and proper answers to his bill, by filing exceptions pointing out the allegations insufficiently answered.

In federal practice exceptions for insufficiency of an answer, are abolished; but the logical sufficiency of an affirmative defense, set-off, or counter-claim set forth in an answer, may be tested by a motion to strike out;^{7a} and an answer is, under new rule 30, deemed to confess all allegations in the bill which are not answered.

An answer so called, which in general terms “denies all the allegations of the bill,” or an answer which “neither admits nor denies any allegation in the bill, and

4a—U. S. Eq. Rule 30.

5—1 Barb. 135.

6—U. S. Equity Rule 64.

7—Wigmore Evid. Sec. 1856.

7a—U. S. Eq. Rule 33.

calls for strict proof of each and every allegation of the bill," upon motion, should be stricken from the files as being no answer.⁸

§ 123. Not required to answer certain allegations. In answering one is not bound to answer allegations which are purely scandalous, impertinent, immaterial or irrelevant,⁹ nor anything which may subject him to a penalty, forfeiture, or criminal prosecution;¹⁰ but if an answering defendant relies upon this objection, he should specify it, as a ground for refusing the discovery.¹¹ A defendant is not required to answer what would involve a breach of professional confidence.

§ 124. Avoid pleading conclusions of law. In an answer, statements of evidential facts should be avoided as far as possible,^{11a} but in answering "fully with attendant details" as is required by bills in equity, this cannot always be done, and in alleging fraud or usury the evidential facts constituting fraud or usury must be pleaded.¹² As a rule conclusions of law should be avoided. Where there is a belief concerning a fact, answers may and should be made upon one's best information and belief, as well as upon knowledge.¹³

§ 125. Averments in the answer and proofs must correspond. An answering defendant must set forth the nature of his defense, because he cannot take advantage of matters of defense shown by the evidence, unless they are set up in his answer.¹⁴ If he wishes to introduce proof of fraud on the part of complainant, he should set forth the evidential facts in his answer, as no presumption exists

8—U. S. Eq. Rules 30 and 33.

9—Davis v. Collier, 13 Geo. 485.

10—Adams v. Porter, 55 Mass. 171.

11—Legget v. Postley, 2 Paige N. Y. 599.

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11a—U. S. Eq. Rule 30.

12—Fitzpatrick v. Beatty, 1 Gilm. 454; Mosier v. Norton, 83 Ill. 519.

13—2 Dan. 257.

14—2 Dan. 240; 1 Barb. 137; Millard v. Millard, 221 Ill. 92.

in favor of an answer any more than in favor of any other pleading. Allegations in an answer, and proofs introduced by defendant, must agree to render the defense available.

§ 126. To reserve benefit of demurrer, answer must specify the ground of demurrer as a defense. The objection that there is adequate remedy at law, will not be considered by the court after filing an answer *not specifying such objection*, but merely "claiming the same advantage as though defendant demurred to the bill."¹⁵

In federal practice, new rule 29 provides that the separate pleading known as a "demurrer" is abolished, and that all objections formerly raised by demurrer, shall be made by "motion to dismiss" the bill, or by answer. If such objection is made in the answer, it should plainly specify the question of law involved in the objection.

§ 127. No affirmative relief upon an answer. No affirmative relief will be granted to a defendant upon an answer as a rule. To get relief beyond mere defense, he must file his cross-bill. But in cases where the maxim that he who seeks equity must do equity, can be applied, the court may require the complainant to do equity to defendant without a cross-bill as a condition to granting relief. And, in some jurisdictions, the existence and priority of different liens may be determined upon answer, for the purpose of sharing in the surplus proceeds of sale, as discussed under the subject of cross-bills.

In federal equity practice affirmative relief is obtained by answer.^{15a}

§ 128. Testing the legal sufficiency of an answer. The usual method of testing the legal sufficiency of an answer, is by "a motion setting the case for hearing on bill and answer."¹⁶ This will raise the question *whether the*

15—Law v. Ware, 238 Ill. 360.

15a—U. S. Eq. Rule 30.

16—Banks v. Manchester, 128 U. S. 244.

facts averred or denied in the answer, constitute a defense to the case stated in the bill. The pleading known as a "demurrer" is not used against an answer, nor are "exceptions" used for this purpose. "Exceptions" to an answer are written exceptions for *insufficient answers* to allegations of the bill. "Exceptions" cannot raise the question of insufficient ground of defense.

When a case is heard "upon Bill and Answer," the matters of fact well pleaded in the answer, are deemed to be true, whether answer under oath has been waived or not, and the case is heard upon the allegations of the bill admitted by the answer, on the one side, and the facts as claimed in the answer, on the other side.¹⁷ Unless the allegations in the bill, *expressly admitted by the answer*, are sufficient, after the explanations and denials in the answer, to clearly entitle the complainant to the relief prayed for, his suit will fail. Only the strongest reasons therefore, will justify a complainant in going to a "hearing on the bill and answer."¹⁸

In federal practice, under new rule 33, a "motion to strike out" is used to test the legal sufficiency of an answer as a defense.

§ 129. Exceptions to an answer. In most jurisdictions an answer may be excepted to for insufficiency, or for scandal or impertinence. Exceptions for insufficiency will be allowed where material allegations or interrogatories in the bill are not fully answered,¹⁹ or where the answer sets up questions of law instead of facts. Exceptions for impertinence or scandal must point out the objectionable matter. Exceptions must be filed before filing replication.²⁰ Even if answer under oath is

17—Leads v. Insurance Co., 2 Wheaton 380; Banks v. Manchester, 128 U. S. 244; Roach v. Glos, 181 Ill. 440.

18—Contee v. Dawson, 2 Bland. 264.

19—Stafford v. Brown, 4 Paige 88.

20—Coleman v. Lynde, 4 Rand. 454.

expressly waived in the bill, answers must be full and direct, or exceptions will lie.

But in the federal practice, exceptions for insufficiency are abolished. If the answer is deficient as a defense, the court will strike it out. If discovery is insisted upon it can be obtained by filing interrogatories, which must be answered under oath.

§ 130. **Waiving answer.** Going to a trial and proofs without defaulting defendant for want of answer, or without getting a rule on him to answer, waives the answer.²¹

§ 131. **Brief review table of defensive pleadings.** In order that the student may obtain a ready comprehension of the various functions and purposes of the different defensive pleadings, it is suggested that the following table be memorized.

²¹—*Jackson v. Sackett*, 146 Ill. 646.

Review Chart of Defensive Pleadings

1. Demurrer asserts bill is so defective in substance, that bill should be dismissed upon plaintiff's own statements therein, or is so defective in form, that defendant should not answer.	General.	{ On general ground of lack of merits (want of equity) or lack of equity jurisdiction over subject matter.	
	Special.	{ On specially mentioned ground such as: Lack of jurisdiction over parties. Lack of indispensable parties. Lack in form or frame of bill. Lack of remedy, suit barred.	
	Ore Tenuis.	{ If demurrer on file is overruled, another ground of demurrer to same part of bill may be mentioned orally before the court.	
	1. To the court's jurisdiction.	{ Over subject-matter or parties.	1. Pleas dilatory or in abatement.
	2. To the parties.	{ Disability of complainant. Non-identity of defendant. Nonjoinder of necessary party. Misjoinder of unnecessary party.	
	3. To the Remedy, or in bar.	{ Bar by Statute of Limitation, of Fraud, of Usury, etc. Bar by court record of prior judgment or decree, or another suit pending. Bar by laches. Bar by release. Bar by account stated or settled. Bar by arbitration and award.	2. Pleas, peremptory, or in bar.
	4. To the merits.	{ Denials or new facts showing the true facts of the controversy do not constitute a cause for relief in any court, equity or law.	
		{ May reserve all the benefits of demurrer or of plea, provided defects are mentioned and are insisted upon at the hearing. Answer must set forth all defenses relied upon.	
		{ If answers to some allegations are necessary, as seen from the bill, defendant cannot escape the answers by disclaiming, but must accompany his disclaimer with the necessary answers.	
2. Plea.			
Pure plea affirms new defensive fact—negative plea denies a material fact of the bill—anomalous plea affirms anticipated defense and denies statements that would invalidate such defense. A plea shows a single defense by denying or alleging certain facts. A successful plea avoids the necessity of answering.			
3. Answer—defendant's full response to all allegations of complainant, also defendant's statement of all his defenses			
4. Disclaimer—Disclaiming all interest in the subject-matter of the suit.			

CHAPTER XII

Replication

§ 132. **Definition.** A replication is complainant's pleading in response to defendant's answer, or plea. It re-asserts the truth and sufficiency of the bill, and denies the truth and sufficiency of the answer, or plea.¹

§ 133. **Effect of omitting replication.** In most jurisdictions an answer or plea is taken as true unless challenged by replication. The complainant, not having replied, can offer no proof, except matter of record. Failure to reply confesses the new matter in the answer, and also the truth of the denials in the answer.² But a replication is waived if the parties go to trial and proofs without it.³ Upon an amended answer, or upon a further answer to an amended bill, a replication should be filed.

§ 134. **Replication brings the cause to issue.** If the complainant neither excepts to the answer for insufficiency, or for impertinence, nor amends his bill to meet new facts in the answer, nor goes to a hearing "upon bill and answer" to test its sufficiency, he must file his

1—1 Barb. 249.

2—The Illinois Chancery Act (sec. 28) provides that the replication shall be filed "in four days after the complainant or his attorney shall be served with notice of answer filed." If he does not so file the replication after such notice, the cause may proceed to a hearing *on bill and answer*; in which case

the answer shall be taken as true, and no proofs will be admitted except matters of record (Ill. Chancery Act, sec. 29). This statute confers upon defendant the right to force complainant to go to a hearing as upon bill and answer, for failing to file replication within four days.

3—Piot v. Davis, 241 Ill., 434.

replication. This puts in issue all the facts set forth in the bill and not admitted in the answer, and the cause is ready for proofs.

In federal practice a replication is not necessary except when an answer asserts a set-off, or a counter-claim; the answer being deemed to bring the cause to issue, and any new affirmative matter in the answer is deemed to be denied by the plaintiff without filing a replication.⁴ After the lapse of time for taking depositions the cause must be placed on the trial calendar.⁵ When the answer asserts a set-off or counterclaim the replication should be not a general replication, but a special one to meet the facts of the answer.

§ 135. Amendments in some states take the place of special replications. By statute in some jurisdictions the replication “must be general, but with a like advantage as if special.” Thus *special* replications, admitting part of the answer and denying the rest, or setting up new facts in reply to new facts in the answer—have become almost obsolete in such jurisdictions, such new facts, in pleading to an answer, being set up in the form of an amendment to the bill (by adding a charging part to the bill), meeting and avoiding the defenses presented by the answer. Of course no such amendment is necessary if such defenses already have been anticipated and avoided by a charging part, or in the stating part of the original bill.

§ 136. When filing of replication is waived. If defendant treats the cause as if at issue, and joins with complainant in taking evidence, without objection, they will thereby waive the filing of replication.

§ 137. Replication need not be signed. Unless required by statute, replications need not be signed by counsel nor be verified by oath.

4—U. S. Eq. Rule 31.

5—U. S. Eq. Rule 56.

CHAPTER XIII

Amendments, Supplemental Pleadings, and Interrogatories

§ 138. **Nature of amendments.** Amendments may be made to correct formal defects, mistakes, defective statements; also to amplify allegations, and to add necessary allegations; also to add a new claim, if consistent with the pleading amended; also to make new parties, or to transpose parties from one side to the other. In federal practice the court may at any time, in furtherance of justice, upon such terms as may be just, permit any process, proceeding, pleading, or record, to be amended, or material supplemental matter to be set forth in an amended or supplemental pleading.¹

§ 139. **Amendment should not make a different case.** An amended bill should not be on a ground repugnant to the original bill, nor present an essentially different, or new case; but a federal court must disregard even such an error if the substantial rights of the parties are not affected thereby.^{1a}

§ 140. **Amendments to meet new facts in the answer.** Filing a replication is a sufficient denial of the answer; but if complainant desires to confess and avoid new defensive facts in the answer, the bill should be amended by adding a "charging part," charging that such defense "will be pretended," and charging the facts which avoid, invalidate, the defensive facts.² In federal practice any

1—U. S. Eq. Rule 19.

1a—U. S. Eq. Rule 19.

2—Connorton v. Millar, 41 Mich.

608; Harding v. Durand, 138 Ill.
515.

new or affirmative matter in an answer is deemed to be put in issue and denied by the plaintiff without his filing any replication or amended pleading.³ In old chancery practice special replications were used to meet new defensive facts in the answer, but in most jurisdictions special replications are abolished. Plaintiff may otherwise amend his bill, so his case may be consistent with the new facts in an answer, or so that he may take advantage of an admission made in the answer.

§ 141. When amendments may be made. Amendments of formal defects, are freely permitted at any stage, but those substantially changing the case are rarely allowed in later stages. An amendment otherwise proper may be refused for delay in applying for leave therefor. Before answer, amendments to a bill are liberally allowed; also before replication.⁴ Upon demurrer sustained, plaintiff is in most cases allowed to amend his bill. Amendments after answer, rest in the discretion of the court.⁵ After pleading filed by defendant consent of court or defendant must be obtained to amend.⁶ After evidence has been taken, and before decree, the bill may be amended to conform to the proofs taken, where the parties have treated the matter of the amendment as if in issue;⁷ but not otherwise, except under special circumstances.⁸ At the final hearing, amendments are allowed when necessary for justice.⁹ After decree, amendments are seldom permitted, and never if the effect would be to present a new claim, or present a materially different case. Amendments may be permitted after decree to correct a clerical error.

3—U. S. Eq. Rule 31.

4—U. S. Eq. Rule 29.

5—Craig v. People, 47 Ill. 487.

6—U. S. Eq. Rule 28.

7—Gordon v. Reynolds, 114 Ill.

123.

8—Bowen v. Idley, 6 Paige N. Y. 46.

9—Koch v. Roth, 150 Ill. 212.

§ 142. **Leave of court must be obtained to amend.** Allowing any amendment, rests in the discretion of the court, and leave to amend must be obtained by an order of court, in the absence of a statute or rule of court to the contrary. The substance of the proposed amendment should be submitted with the application for leave, and the facts making the amendment necessary should be stated.¹⁰

§ 143. **Method of amending the bill.** Minor amendments are sometimes made by interlineations in the original bill, if they do not seriously deface it. The better practice is to amend by separate bill. The amendment must be actually made; neither a stipulation nor an order for an amendment will be treated as an amendment.¹¹ Irregularity of an amendment may be objected to by a motion to take it from the files. A demurrer is the proper way to test the merits of an amendment, and a plea can be filed to an amendment of the bill, as well as to the original bill.

§ 144. **Amending the answer.** An admission in an answer cannot be retracted by an amended answer, unless the admission is shown to have been made by mistake. In the federal practice an answer may be amended by leave of court or judge, upon reasonable notice so as to put any averment in issue when justice requires it.¹² Also upon motion to strike out for legal insufficiency, the court, if the answer is amendable, may permit amendment upon terms.¹³

§ 145. **New answer to amended bill.** Where a bill is amended to conform to the proof already taken, an amended answer is proper to present the new issue to the court upon the pleadings in the regular way, and also for

10—Walsh v. Smyth, 3 Bland. Md.

12—U. S. Eq. Rule 30.

9.

13—U. S. Eq. Rule 33.

11—Wilson v. King, 23 N. J. Eq.

150.

the purpose of giving the defendant an opportunity to allege new defenses to meet the amendment.¹⁴ If defendant treated complainant's proof as if in issue when taken, the court granting leave to file a new answer, will probably limit an amendment to the answer to merely conform to the proofs already taken by defendant. Such amendment is then needed because the doctrine that allegations and proofs must correspond, applies to the answer as well as to the bill.¹⁵ Federal rule 32 requires defendant to amend and file his answer ten days after an amendment to the bill is filed, or suffer a default. In most jurisdictions, where complainant materially amends his bill, the defendant should be ruled to answer.¹⁶

§ 146. A material amendment vacates all default orders. The regular and proper course upon a material amendment being made to the bill is for the court to set aside all default orders. If the court does not expressly set aside default orders in such case, then, nevertheless, the mere filing of a material amendment to a bill, of itself, sets aside all default orders previously entered.

§ 147. A party may object to a variance in the proofs and thus force an amendment or keep out the evidence. When evidence upon a point not in issue is offered, the opposite party may prevent such evidence, and force his adversary immediately to amend, by making the specific objection that the evidence offered is not relevant to any issue made by the pleadings. The court may reject the evidence or permit the amendment, if it is necessary and material, but it will also give the objecting party time to meet the new issues.

§ 148. Amendment by supplemental bill. When a pleading becomes defective by events occurring after its

14—South Chicago Brew. Co. v. Taylor, 205 Ill. 142.

16—Coman v. Lovett, 10 Paige, N. Y. 559; Harms v. Jacobs, 160 Ill.

15—Dowden v. Wilson, 108 Ill. 593.
257.

filing, effecting a change in the interests of the parties, or in the subject matter of the suit; or if through newly discovered evidence it becomes apparent that some new party should be brought in, or some new fact be alleged, the defect may be cured, and the new facts alleged, by filing a supplemental pleading.¹⁷

§ 148A. Bill of particulars in federal courts. A further and better statement of the nature of the claim or defense, or further and better particulars of any matter stated in any pleading, may in any case be ordered, upon such terms as to costs and otherwise as may be just.¹⁸

§ 148B. Interrogatories, production of documents in federal court. In the federal court, the plaintiff and the defendant after filing their pleadings may file interrogatories in writing for discovery by the opposite party of facts and documents material to the support or defense respectively, with a foot note stating which of the interrogatories each individual party is to answer. If one of the parties is a corporation, the court may order the examination of any officer of the corporation, upon motion therefor. Each interrogatory must be answered fully in writing under oath, and the answers must be filed within fifteen days. The court may also enforce the production or inspection of documents in the possession of either party, containing evidence material to the claim or defense of his adversary. Either party also may, by a demand ten days before trial, call on the other to admit in writing the execution or genuineness of any writing, saving all just exceptions.¹⁹

17—U. S. Eq. Rule 34.

19—U. S. Eq. Rule 58.

18—U. S. Eq. Rule 20.

CHAPTER XIV

Evidence in Chancery

§ 149. Evidence is limited by the pleadings. The object of pleadings is to state a valid claim or defense, and to limit the evidence to the matters pleaded, and therefore as a rule no evidence will be considered, except that relating to matters alleged in the respective pleadings.

Under general allegations, specific, evidential facts may be proved, provided they are covered by the general allegation, and provided the allegation serves to give notice to the opposite party of the nature of the evidence to be introduced.

§ 150. Admissions and denials by the pleadings, by defaults, by stipulations. Before the time for introducing evidence, each party should determine what facts have been admitted and what have been denied, (1) by the pleadings, (2) by defaults, (3) by agreements or stipulations in writing.

1. **ADMISSIONS AND DENIALS IMPLIED IN THE PLEADINGS.** Admissions or denials by the pleadings may be implied under the forms of pleading. For example, filing a plea grants the truth of all the matters well pleaded in the bill, and not denied by the plea;¹ filing a demurrer grants the truth of all facts properly alleged in the bill, at least so far as arguing the demurrer is concerned; but where an answer filed does not deny or explain an allegation in the bill, it is deemed to deny such allegation in most

¹—2 Dan. 396.

jurisdictions, and is deemed to confess them in some jurisdictions.²

EXPRESS ADMISSIONS IN THE PLEADINGS. Admissions by the pleadings may be express: All admissions made by the defendant in his answer, may be read by plaintiff in evidence against him, without making the denials contained in the answer, evidence in defendant's favor. But where instruments are set forth in *haec verba*, mistaken averments or admissions of the legal effect of such instruments, will not conclude the pleader.³

NO ADMISSION OR DEFAULT VALID AGAINST AN INFANT. Infants and persons *non compos*, are the special wards of chancery courts, and therefore an exception exists in their favor. Even if an infant's guardian *ad litem*, in his answer, should admit certain allegations in the bill, nevertheless, as against such infant, complainant must strictly prove each such material allegation just as if it had been denied by the answer. Neither a default nor a decree *pro confesso* can be entered against an infant, or person *non compos*.

ADMISSIONS BY AVERMENTS OF BILL. The facts positively alleged in the bill, are deemed to be admissions made by the complainant.⁴ The complainant cannot use his own bill as evidence in his favor, unless the defendant by his answer has admitted, expressly or by implication, the truth of certain parts of the bill, in which case the complainant may use such portions of his bill as the admissions of the defendant.⁵

ADMISSIONS MAY BE UPON INFORMATION AND BELIEF. It is not necessary that the defendant should in his answer make a positive admission in order to have it read

2—U. S. Eq. Rule 30.

3—Phillips v. Gannon, 246 Ill. 98.

4—2 Dan. 306.

5—McGowan v. Young, 2 Ala. 598.

in evidence against him; it will be sufficient if he alleges that he believes, or is informed and believes, it to be true; unless it is accompanied by some statement which prevents its being considered as an admission.⁶

2. **CONFESSIONS BY DEFAULT.** By default in appearing, or in filing a pleading, a defendant confesses the entire bill. By default in filing a replication (in those jurisdictions where replications are required), complainant confesses the truth of an answer, unless the parties proceed to proofs as if replication were filed.⁷

3. **ADMISSIONS BY EXPRESS STIPULATION.** To save delay and expense parties often stipulate in writing as to certain facts.

All other material allegations which are not confessed or denied in the manner above discussed, whether they occur in the bill or in defensive pleadings, must be proved by evidence.

§ 151. **Taking testimony.** Formerly, all testimony in chancery was taken secretly, and reduced to writing upon written interrogatories and cross-interrogatories, before an examiner, neither party to the suit being permitted to be present, even by counsel. Neither party was entitled to a copy of the interrogatories prepared by the other for his witnesses. Each party drew up the interrogatories for his own witness, and the witnesses were separately and secretly examined by the examiner, and no part of the testimony was disclosed to either side until publication day, when no more evidence could be taken. But each party was entitled to a list of his opponent's witnesses, that he might examine them upon cross-interrogatories. But since he neither knew what the direct interrogatories were, nor how they had been answered, such cross-interrogation was unsatisfactory

6—Potter v. Potter, 1 Ves. Sen.
274.

7—Marple v. Scott, 41 Ill. 50.

and harmful. Full directions were given the examiners how to proceed. The witness was not permitted to see the interrogatories he was to answer; each one was read over to him and he was required to answer it in full before the next was read. After the testimony was taken it was filed in court, where it remained until publication day; by which is meant the day they were open for inspection, and each side was furnished with copies. Thus, after the cause was ready for hearing, the counsel for the first time learned what evidence had been introduced.⁸

This old practice has been modified in United States Courts and in those of many of the States. The modern tendency is to allow oral testimony in open court, as in law cases, and, when interrogatories are used, to allow inspection of interrogatories, and to allow oral examinations by counsel, as well as examinations upon written interrogatories propounded by examiners, and to allow all parties and counsel to be present.

In the federal courts oral testimony is required as a rule, and the court passes upon the admissibility of all evidence as in actions at law. When evidence is offered and excluded, and the party against whom the ruling is made, excepts thereto at the time, the court must take and report so much thereof, or make such a statement respecting it, as will clearly show the character of the evidence, the form in which it was offered, the objection made, the ruling and the exception.⁹ The court or officer may in his discretion appoint a stenographer whose fees are taxed as costs.^{9a}

Some statutes permit oral evidence in court or before the master, the evidence being preserved in writing.¹⁰

It is still the more usual practice to take the evidence orally and reduce it to writing prior to the court hearing

8—Dan. Chap. XX.

9a—U. S. Eq. Rule 50.

9—U. S. Eq. Rules 46, 47, 48, 49,
50, 51, 52, 53, 54, 55, 56.

10—Owen v. Ranstead, 22 Ill.
172.

of the cause, and it is still usual to take such evidence before a master, examiner or commissioner.

In the federal courts, in patent and trade-mark cases, the court upon petition, may permit the testimony of experts whose testimony is directed to matters of opinion, to be set forth in affidavits. If the opposite party desires to cross-examine the expert, he must be produced, or the affidavit cannot be used as evidence.^{10a}

§ 152. Preserving evidence in the record. In chancery cases, courts of appeal determine questions of fact from the evidence in the record, and they are not bound by the findings of the lower courts, and may make different findings of fact. There are no presumptions in favor of the validity of a decree in chancery, as there are in favor of a judgment at law. Therefore, all proceedings, including the evidence in a chancery cause, should be contained in the record to support the decree and so that all testimony will appear for the reviewing court.

§ 153. Even rejected testimony should show upon the record. Even if statutes or rules of court permit oral testimony to be taken on trial in open court, as at law, a stenographer should reduce it to writing.¹¹

In the federal courts the party wishing to rely upon rejected testimony taken orally before a court or master, must see to it that the court or master, preserves the testimony in question, and the objection and ruling there-

10a—U. S. Eq. Rule 48.

11—"While, therefore, we do not say that, even since the Revised Statutes, the circuit courts may not in their discretion, under the operation of the rules, permit the examination of witnesses orally in open court upon the hearing of cases in equity, we do say that now they are not by law required to do so; and that, if such practice is adopted in any case, the testimony presented in

E. P.—7

that form must be taken down or its substance stated in writing and made part of the record, or it will be entirely disregarded here on an appeal. So, too, if testimony is objected to and ruled out, it must still be sent here with the record, subject to the objection, or the ruling will not be considered by us. A case will not be sent back to have the rejected testimony taken, even though we might, on examination, be of the opinion

to in writing of record, in the same manner as if taken before an examiner.¹² New rules 46 and 50, may not change this practice.

§ 154. **Forms in which evidence in equity is preserved of record.** Testimony in chancery, reduced to writing, usually appears and is preserved in the record, under the form of (1) a judge's certificate of evidence; (2) a master's report; (3) depositions; (4) affidavits.

1. **A JUDGE'S CERTIFICATE OF EVIDENCE:** Testimony orally delivered by the witness himself in open court, before the judge who passes upon it, reduced to writing and verified by a stenographer, then certified by the judge as being a complete and true record of the proceedings and evidence before him, and *ordered by the judge to be made a part of the court record of the cause*. Such testimony is neither subscribed nor verified by the witness.

Documents may be introduced with or without such oral testimony; and documents may constitute the entire subject matter of the certificate of evidence.

2. **A MASTER'S REPORT OR CERTIFICATE OF EVIDENCE:** Testimony orally and publicly delivered by the witness himself before the master who passes upon it, reduced to writing and verified by a stenographer, then certified by the master as being a complete and true record of the proceedings and evidence before him, and usually included in the master's report or certificate to the court; which report of itself is part of the court record of the cause.

Testimony before the master is usually read over, sub-

that the objection to it ought not to have been sustained. Ample provision having been made by the rules for taking the testimony and saving exceptions, parties, if they prefer to adopt some other mode of presenting their case, must be careful

to see that it conforms in other respects to the established practice of the court." (Blease v. Garlington, 92 U. S. 1; Massenberg v. Dennison, 107 Fed. 21.)

12—Blease v. Garlington, 92 U. S. 1.

scribed and verified by the witness, and is loosely termed a deposition, because so subscribed and verified. The only requirement laid down in court rules or chancery practice is that testimony taken *viva voce* before a master shall be reduced to writing by the master or his clerk, and preserved in the master's office for use in court, if necessary.¹³ There seems to be no rule of court or statute requiring testimony before the master to be read over and subscribed and verified by the witness as is the case with depositions. It is good practice in most jurisdictions to have it done.¹⁴

Documents may be introduced with or without such oral testimony, and may form the entire subject-matter of a master's report of evidence; as for example, the trust deed and notes in a foreclosure suit.

Unless the master is directed by statute, by rule of court, or by the order of reference, to report the evidence back to court, he need not do so.¹⁶

3. A DEPOSITION: A sort of secondary evidence, read to the court or master,¹⁷ being testimony under oath, subscribed¹⁸ and verified by the witness, and delivered out of court and before a commissioner, examiner or notary public, and by such officer reduced to writing, verified, certified and returned to the court, for the purpose of being read to the court or master, who is to pass upon the evidence.

Loosely speaking, all deposing under oath, whether before the court, master, special commissioner, examiner, notary, or in an affidavit, is called a deposition; but in

13—McClay v. Norris, 9 Ill. 386; 1 Barb. 502; 2 Smith's 147; Rule 69 Eng. Ch. Orders, 1828; N. Y. Ch. Rule 105; U. S. Eq. Rule 65; N. J. Ch. Rules 44, 196; Rule 4 governing Masters, Cook County, Ill.

14—1 Barb. 503; Remsen v. Remsen, 2 Johns, Ch. N. Y. 495; Eisenmeyer v. Sauter, 77 Ill. 515.

16—Hayes v. Hammond, 162 Ill. 135; Schnadt v. Davis, 185 Ill. 476.

17—Weeks on Dep. p. 6; Haupt v. Henninger, 37 Pa. St. 138.

18—1 Barb. 285.

a strict sense, the term "deposition" should be limited as in this paragraph defined. It is totally different from the testimony before the court or before a master, and the laws regulating depositions have no application to such oral testimony before the court or before the master.²⁰ Statutes and formal rules of court, differing in every jurisdiction, govern the taking and returning of depositions. Oral evidence in the master's office is like oral evidence before the judge.²¹

Documents may be introduced in connection with deponent's testimony.

THE REASONS FOR VERIFYING A DEPOSITION. Testimony heard and taken by others than the chancellor or master who judges the case upon it—in other words, depositions—should be as well authenticated as is practicable, and therefore should be verified and subscribed by the witness himself, after being read over to him, as well as be signed and vouched for by the notary or examiner who writes it down.

In the federal courts, all evidence offered before an examiner or other like officer, together with any objections, must be saved and returned into the court.²² Depositions, to be used before the court or before the master upon a reference, will be permitted by the federal court only for good and exceptional reasons.^{22a}

4. AFFIDAVITS: Statements made out of court without opportunities for cross-examination and sworn to before some officer empowered to take oaths, anciently much used, but in modern times limited to injunction cases, and a few other *ex parte* motions. In some jurisdictions affidavits may be used to support the bill or the answer, upon motions to dissolve an injunction, and upon

20—Troy Iron v. Corning, 7 Blatchf. 16; Mason v. Blair, 33 Ill. 204.

21—Cox v. Pierce, 120 Ill. 556.

22—U. S. Eq. Rule 49.

22a—U. S. Eq. Rule 47.

motions for a continuance, and to compel the production of books and writings.

As a general rule affidavits can be used as evidence before the master only when authorized by the order of reference, or when under the same circumstances a court may proceed upon affidavits.²³ Depositions, affidavits and documents previously introduced and on file in the cause, may be used as evidence before the master if produced before him.²⁴

As stated before, affidavits are permitted in the federal courts in trade-mark and in patent cases, but with the right of cross-examination in open court, reserved to the opposing party.

§ 155. Other ways in which evidence is deemed to be preserved of record. Recitals in a decree serve the purpose of preserving evidence of record.²⁵ If oral evidence was taken and not reduced to writing, or if the judge's certificate of evidence, or the master's report of evidence, or the depositions containing evidence, are lost, and thus not part of the court's record of the cause, the decree will still be deemed to be supported by evidence duly taken, if it makes specific findings of ultimate facts, thereby showing such facts to have been proved as were not admitted by the pleadings. But the bare general finding in a decree that "all the material allegations in the bill are proved and that the equities of the case are with the complainant," will not sustain a decree granting relief unless such decree be based upon the findings in a verdict of a jury, called to try the facts, or upon the findings in a master's report.²⁶

§ 156. When evidence need not be preserved of record. *Pro confesso* decrees need not be supported by

²³—1 Barb. 495.

²⁶—Ohman v. Ohman, 233 Ill. 632.

²⁴—U. S. Eq. Rule 64.

²⁵—Gorman v. Mullins, 172 Ill. 349.

evidence of record, nor a decree dismissing a bill for want of equity, or otherwise dismissing the bill.^{26a} But in most jurisdictions, default divorce decrees must be supported by evidence taken in open court.

§ 157. **Exhibits omitted before examiner or master, may be introduced in open court.** Exhibits, deeds and other written instruments relating to the cause may be produced and proved *riva voce* at the hearing for decree, where the party using them has omitted to establish their genuineness before the officer taking the proofs.²⁷ A satisfactory excuse must be given for not making proof in the usual way.²⁸

§ 158. **Objections and rulings upon evidence in chancery.** Examiners, commissioners and notaries, taking depositions, are not supposed to be qualified, like judges and masters, to pass upon objections to evidence; and besides, they have no pleadings to show what issues form the case. If these officers were permitted to pass upon evidence, errors of ruling would be too numerous and cause too much inconvenience, especially when depositions are taken at distant places. Hence, the wise practice that all evidence deposed before such officers be received subject to the objections stated, and that the officer taking the deposition be without power to reject or pass judgment upon the admissibility of evidence, or to rule upon objections. Objections should be stated nevertheless. They can be passed upon later by the court upon a motion to suppress the deposition. The courts have power to deal with the costs of incompetent, immaterial, or irrelevant parts of depositions.^{28a}

§ 159. **Objections should be made in time to afford correction.** If an objection is intended to be insisted upon

26a—Smith v. Trimble, 27 Ill. 152; Jackson v. Sackett, 146 Ill. 646; First Nat. Bank v. Baker, 161 Ill. 281.

27—1 Barb. 308.

28—Cosequa v. Fanning, 2 Johns Ch. N. Y. 481.

28a—U. S. Eq. Rule 51.

when the deposition is read to the court at the hearing for decree, or to be insisted upon when later the case is appealed, it should first be made in time to give opportunity for correction, if correction be possible. Objections based on informalities and irregularities in taking proofs should be made by motion to suppress the deposition before the hearing, and if overruled, an exception should be taken; but all more substantial objections may be made at the hearing for decree, either before or after the evidence is read. Incompetent testimony should be objected to, lest it be treated as competent, in the absence of objections.²⁹

§ 160. Exceptions unnecessary to rulings upon objections. Unless required by statute or court rule,^{29a} exceptions need not in chancery be taken or preserved to the rulings of judges or masters upon objections to evidence.³⁰ But exceptions should be preserved at a jury trial where the chancellor has submitted an issue of fact to be tried by a jury.

The federal courts are required to pass upon the admissibility of all evidence offered, as in actions at law. Therefore exceptions to the ruling of the court must be made by the party against whom the ruling is made, and the court, when evidence is offered and excluded, must take and report so much thereof, or make such a statement respecting it, as will clearly show the character of the evidence, the form in which it was offered, the objection made thereto, the ruling of the court, and the exception.^{30a}

§ 161. To save an objection for review, it should be insisted upon. To save for review an objection as to the

29—*Millard v. Millard*, 221 Ill. 86.

30—*Swift v. Castle*, 23 Ill. 209.

30a—U. S. Eq. Rule 46.

29a—Cook Co. Ill. Chan. Rule 2.
(Mas. in Chan.)

admissibility of evidence the objection should be made and insisted upon successively before the master when evidence is taken, then upon objections to his report, and then upon exceptions to the report before the chancellor.

§ 162. Judges and masters should express **their rulings, upon the record.** Where evidence is taken in open court, or before a master, the court, and master both have authority,³¹ and should rule upon objections to evidence before the taking of the evidence is closed.³² A party naturally relies upon his evidence, when the court, even against objection, admits it into the record, and at no time later rules against it. A ruling is necessary to inform a party before it is too late, whether the court or master regards the evidence as competent. Otherwise parties will be misled into relying upon evidence which even the lower court, or master, may secretly deem later to be improper under the objection, and which might have been corrected, if the lower court or the master openly had ruled against it. Objections produce little impression, but a ruling of the court or master produces caution. The function of an objection, is not only to prevent incompetent testimony, but also to give warning and notice to produce competent testimony.³³ A party may suffer as much if the court or master fails to rule upon objections as by an erroneous ruling.³⁴

Objections must be called to the attention of the chancellor and a ruling should be insisted upon by both parties; and objections must be specific enough to point out the grounds of incompetency.³⁵ If a ruling is not insisted upon, it may be deemed to be waived.³⁶ In

31—U. S. Eq. Rule 62; *Wooster v. Gumbriner*, 20 Fed. 167.

32—*Lathrop v. Bramhall*, 64 N. Y. 365; U. S. Eq. Rule 48.

33—*Millard v. Millard*, 221 Ill. 86.

34—*Lathrop v. Bramhall*, 64 N. Y. 365.

35—*Hamilton v. S. N. Gold Min. Co.*, 33 Fed. 562; *Freeny v. Freeny*, 80 Md. 406.

36—*Bunnel v. Stoddard*, 4 Fed. Case No. 2135.

some jurisdictions if a ruling is reserved and not rendered and the evidence is harmful and incompetent, the effect of reserving and not ruling is the same as if the objection had been overruled and exception taken.³⁷ Failure to rule after reserving decision has been held to be ground for recommitting the report.³⁸ A master or a judge may reserve his ruling till later evidence throws more light upon the case, but the rulings should be announced when the evidence is all in.^{38a}

A judge or a master, though ruling against testimony, should still allow the rejected testimony to appear in the record, subject to the objection and ruling, for a reviewing court to pass upon.³⁹ In the federal courts he cannot refuse this right,⁴⁰ and this course should be pursued where there is any doubt about the competency of the evidence.⁴¹ The chief concern of a reviewing court *is to have the evidence in chancery causes appear in the record for review.*

§ 163. When objections to master's rulings on evidence are brought before court for review. In most jurisdictions the general practice is to seek the opinion of the court on the master's ruling upon evidence, when the master has made his report.⁴² But in some jurisdictions, objections to the master's rulings upon evidence should be brought before the chancellor immediately *after* the evidence and testimony before the master is closed, and *before* the master makes his report..⁴³

37—Lathrop v. Bramhall, 64 N. Y. 365.

38—Berrian v. Sanford, 1 Hun. (N. Y.) 625.

38a—Lathrop v. Bramhall, 64 N. Y. 365.

39—92 U. S. 1.

40—Fayerweather v. Riteh, 89 Fed. 529; U. S. Eq. Rule 46.

41—Ellwood v. Walter, 103 Ill. App. 219.

42—1 Barb. 484.

43—Cook County, Ill. Eq. Rules; Dickinson v. Torrey, 91 Ill. App. 304; Glos v. Hoban, 212 Ill. 222.

CHAPTER XV

Motions of Course and Motions not of Course

§ 164. **Interlocutory motions or petitions.** An interlocutory motion is an application or request made to the court for some interlocutory order commanding or forbidding certain acts, either to further the proceeding or to protect the rights of some of the parties to the suit. Such applications may be made orally, and are then called motions; or they may be made in writing, when they are called petitions. A request should be made in writing, if based upon a long statement of facts.

§ 165. **Motions of course and motions not of course.** Motions of course are those which are granted as a matter of course under some standing rule of court, or according to the known practice of the court. Motions not of course are those which will be granted or refused according to the discretion of the court.

In the federal courts the clerk receives and grants all motions, rules, orders, and other proceedings which are grantable of course, such as issuing process of subpoena requiring defendant to appear and answer the bill, or such as issuing final process, like writs of attachment, sequestration or assistance, to enforce and execute decrees, or to grant orders that bills be taken *pro confesso*.¹

Upon the granting of a motion, the solicitor should himself invariably draw up the court's order in writing. It is seldom that the court or its clerk can have the details of the order in mind, and often the order is forgotten and not entered by the court.

1—U. S. Eq. Rules 2, 5, 7, 8, 9.

CHAPTER XVI

Dismissal of Bill

§ 166. **Dismissals by plaintiff.** The dismissal of a bill “without prejudice” and a simple dismissal, have the same effect, and are without prejudice to the bringing of a new suit. In English practice, plaintiff could dismiss his bill at any time before decree, and this is the rule in some jurisdictions in the United States. An order of court must be obtained to effect a dismissal, and in the United States there is a decided tendency to regard the application as resting in the discretion of the court, to be exercised with regard to the rights of the parties. Therefore, in many jurisdictions there can be no “dismissal without prejudice” when the dismissal would in fact be *with prejudice* to other parties, or where orders affecting the merits have been entered, or where the court has announced its decision, or after demurrer sustained and leave to amend not availed of, or after an adverse report by a master, or after a cross-bill asking affirmative relief has been filed.

§ 167. **Dismissals by defendant.** A bill will be dismissed upon hearing, on motion of defendant, where plaintiff unreasonably delays the prosecution of the cause, but ordinarily not while the cause is pending before a master. If an indispensable party is lacking, and it is impossible to bring him in, the bill can be at once dismissed. In some jurisdictions it is the practice, even before a hearing, to entertain a motion by defendant to dismiss the bill for want of equity appearing on its

face, which cannot be cured by amendment. Such a motion is equivalent to a demurrer. If a plaintiff ignores interlocutory orders, the defendant may have the bill dismissed; and if a solicitor is not authorized in the particular court to file a bill, defendant may have the bill dismissed.

§ 168. **Dismissal on court's own motion.** The court may dismiss a bill at any stage of the proceedings for want of equity, upon its appearing that there is an entire lack of equity jurisdiction.¹ If a bill is dismissed "for want of equity" by the court upon hearing for decree, such dismissal may be pleaded in bar to a new bill filed for the same cause of action; and a bill cannot be dismissed "without prejudice," in such case, when a new bill must cover the same ground. When the pleadings are defective, or when through some informality in the bill, the court cannot give the complainant relief,² or where from some other cause the bill is dismissed without the court passing upon the merits, and it appears that the complainant may be entitled to some relief, it should be dismissed *without prejudice*.³

§ 169. **Dismissal after decree.** After a decree, the bill cannot be dismissed except by consent; but after a reversal of a decree without directions, the complainant may dismiss the bill; the effect of the reversal being, to leave the cause pending for hearing, as if no decree had been rendered.⁴

1—Richards v. Lake Shore R. R. Co., 124 Ill. 516.

3—Story's Eq. Pl. Sec. 793.

2—Crozier v. Acre, 7 Paige, N. Y. 137.

4—Mohler v. Wiltberger, 74 Ill. 163.

CHAPTER XVII.

The Hearing in Court

§ 170. **Procedure, upon hearing for decree.** Either party may set the cause down for hearing for decree, after the cause is at issue. On the hearing, the complainant's bill is first read, or stated in substance; then the defendant's answer; after which the matters in issue are stated to the court, together with the equitable points of law arising thereon. Then the complainant's evidence is heard, or if the evidence is not taken in open court, the depositions which were taken, are read to the court, and after this the defendant's evidence, and then again the complainant's evidence in rebuttal. If the cause is on hearing upon a master's report, the evidence is not read, but the master's findings are read, also the exceptions thereto, if any were filed. After this follows the argument of the complainant's solicitor, which is followed by that of the defendant's solicitor, after which the complainant's solicitor may reply.

§ 171. **Abstracts of evidence specially made for the court.** "Preparatory to submitting a cause to the court for hearing upon the pleadings and evidence, if the same are voluminous, proper abstracts thereof, with indexes thereto, should be prepared. The evidence bearing upon each issue, or distinct question of fact, should, so far as possible, be grouped together, first citing all the evidence in favor of counsel's view on each issue, and then citing all the evidence against that view; so that the court may easily verify the evidence on each issue. There is no

other step in the preparation and submission of a cause, in which care, discrimination and thoroughness on the part of counsel, are of greater moment than in bringing together in logical and lucid form and sequence the vital issues of fact in the case and the evidence applicable thereto.”¹

§ 172. **Petition at hearing for leave to amend or to present new evidence.** “After taking evidence is closed, and before final decree, if a party desires to present any new matter in the way of issue or evidence, he must apply for leave to the court by petition setting up the new matter or issue, so that its relevancy and materiality may be judged, and asking leave to introduce further evidence, or to amend the pleadings, and also showing the reasons why the party was not at fault in not earlier presenting the matter.”²

1—Shiras, Eq. Pr.

2—Shiras Eq. Pr.

CHAPTER XVIII

Decrees and Decretal Orders

§ 173. Counsel prepares the decree. A decree is the decision and mandate of a court of equity, upon issues properly presented and heard by the court. Decrees are final or interlocutory. When the decision of the court is made known, a decree in accordance therewith should be prepared by counsel and be submitted to the judge for signature, and when signed it must be filed with the clerk for entry. It should clearly set forth the exact findings of fact, according to the pleadings and evidence; and should clearly set forth the findings of law by the court, upon the issue or issues passed upon; and if by such decree the defendant is ordered to do or refrain from doing any act, the same should be set forth clearly, in the mandatory or ordering part of the decree; and, the time, mode and condition of doing an act should be definitely stated.¹

§ 174. Counsel serves copy upon opposite solicitor. Counsel serves upon the opposite solicitor a copy of the order or decree, with notice of the time and place he will apply to the court to have the order or decree settled. If it is satisfactory, opponent's solicitor usually indicates his consent by an endorsement on the draft. If it is not satisfactory, opponent's solicitor proposes amendments to the draft of decree and appears before the court, and the court settles the decree. When a mistake or clerical error has been made in a decree, it may be corrected by

1—Shiras Eq. Pr.

the court, upon motion or petition, made after entry and before enrollment. The party making the application must show that he has been injured by the error or mistake.²

§ 175. **Final and interlocutory decrees.** A decree which finally disposes of the rights of the parties upon the merits of any branch of the controversy is final; but if the merits are not passed upon, and the order is made simply as an additional step towards a final determination upon the merits, it is an interlocutory decree.

The distinction is important, because the right to appeal from a decree is statutory and must be strictly followed, and the statute usually restricts the right to appeal to final decrees. A final decree remains under the control of the court, subject to be modified or set aside only during the term in which it was entered. After that term, the court is powerless to modify it or to enter any further orders, except those necessary to enforce the decree. On the contrary, a decretal order, or interlocutory decree, remains entirely subject to the control of the court, and it may be modified or set aside at any time and at any term until final decree.

§ 176. **Final decree.** If the decree determines litigated issues and, without further judicial action, fixes rights and liabilities of parties, the decree is final for the purposes of appeal, although the trial court may continue its jurisdiction over the case for ministerial purposes, such as making sale of property, or taking an account rendered necessary by the terms of the decree, or otherwise executing the decree rendered.

§ 177. **Interlocutory decree.** If the decree, though in form final, cannot be carried immediately into effect, and does not execute itself, but needs further judicial

²—Yarnell v. Brown, 170 Ill. 362.

action, it is interlocutory, and therefore an appeal cannot be taken.

§ 178. Decree in part final, in part interlocutory. A decree may be in part final and in part interlocutory, as where it settles rights as to a part of the subject-matter, and reserves for further consideration questions independent of that part; or where a decree disposes of the whole case as to only some of the parties.

§ 179. Pro Confesso or default decrees. If a defendant, having been duly served, fails to enter an appearance within the proper time, or, having appeared, fails to file a plea, demurrer or answer to the bill, by the proper day, the complainant may have the court enter an order finding such defendant to be in default, and that the bill be taken *pro confesso*.

§ 180. Rule days for defaults. In most jurisdictions court rules provide that on and after the third day of each term, defaults may be entered as to defendants properly served who filed no appearance or pleading.

In the federal courts defendant must plead within 20 days after being served with process, or be subject to default.^{2a}

§ 181. Complainant may take default decree or force an answer. Upon default the cause may proceed *ex parte*, and a default decree therein may be entered;³ or the complainant, if he requires an answer to enable him to obtain a proper decree, may procure process of attachment against such defendant, upon which the defendant may be arrested and held until he fully complies with the order of the court as to pleading to or answering the bill. A decree *pro confesso* is also known as a "default decree" or a "decree by default."

^{2a}—U. S. Eq. Rule 16.

³—U. S. Eq. Rule 16.

Thomson v. Wootter, 114 U. S. 104.

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§ 182. **Default decree should find facts as to service.** In order to support a decree *pro confesso*, the decree should find all the facts showing the services of summons, or service by publication, was regular and according to law, unless such facts have been found and recited in a prior order entering the default of record.

§ 183. **No defaults or confessions against infants.** Neither a default, nor a decree *pro confesso*, can be entered against a minor or against persons *non compos*. Against such parties there must be evidence in the record sufficient to sustain the decree.

§ 184. **Effect of order pro confesso.** The order that the bill be taken *pro confesso* is not in itself a decree, but only a decretal order. It precludes defendant from offering affirmative defenses or evidence, and establishes the confession of defendant to the truth of all definite and certain allegations of the bill; but allegations not certain must be supported by sufficient proof. In any case, however, the court may in its discretion require proof. Where proof is taken, the decree should depend thereon and not on the bill alone. No decree can be entered unless the bill alleges sufficient facts to warrant a decree. Defendant may appear and show that the bill does not warrant the decree sought, but this must appear from the averments of the bill.

§ 185. **Power of court to vacate decree pro confesso.** The power of the court over default decrees, is more extensive than over decrees rendered upon a hearing of both parties. In some jurisdictions a default decree may be set aside in the discretion of the court, upon motion or petition, even at a subsequent term, in order to let in a meritorious defense, and to prevent fraud and mistake. Defendant as a rule is required to show a reasonable excuse for his failure to appear or answer, and must show promptness in making his application after knowl-

edge of the decree, and must show that he has a meritorious defense.

§ 186. **Enforcement of decrees by attachment or sequestration.** It is one of the maxims of equity that a decree acts *in personam*. By this is meant that the decree is enforced, if necessary, by issuing an attachment against the person, when within the jurisdiction of the court, and also by sequestration of the goods and lands, within the jurisdiction, of an absent defendant, until he complies with the decree. A decree usually orders a defendant personally to do, or cause to be done, or refrain from doing certain acts. The great equity remedies of compulsion and prevention, actively compel or prevent *particular acts*, whereas the common law remedy of damages simply compensates for wrongs already suffered. The citizen can be rescued from danger by equity; he can only be consoled after his injury by law. The common law courts can do no more than to issue process to satisfy the plaintiff's demand by seizure and sale of his property. In chancery it is not usual to issue process of execution. But it may be done.

Before a defendant is deemed to be in contempt he must be personally served with a writ, under the seal of the court, which recites that part of the decree which the defendant is to obey. A party is in contempt if he neglects to comply with the decree within the time therein specified. If the party has been served with such a writ and he neglects to obey it, the fact is brought to the attention of the court by affidavit, and a writ of attachment is issued, upon which he is arrested and brought before the court, and if he does not purge himself of the contempt, or comply with the mandate at once, he is committed to jail.⁴

4—U. S. Eq. Rule 8.

CHAPTER XIX

Examiners and Special Commissioners

§ 187. **Examiner.** An examiner is an officer of a chancery court. His duties are to receive interrogatories for the examination and cross-examination of witnesses, and to examine and cross-examine such witnesses; to reduce the depositions to writing, and to read them to the witnesses before they sign the same. He is authorized to administer the usual oaths and to take the usual affirmations of witnesses. By statutes of the various states, and by rules of practice in the various courts, the duties of examiners and of special commissioners are now performed also by notaries public, justices of the peace, masters in chancery and judges of courts. In some jurisdictions examiners are appointed by special commission and are called "Special commissioners."

§ 188. **Special commissioners.** The phrase "Special Commissioner" means a person or officer holding a "special commission" in the form of *letters patent* issued by a government, or a warrant contained in *an order of court*. Such letters, or order of court, define the powers or duties of the person or officer so specially commissioned. In chancery practice, special commissioners are persons or officers specially appointed under a *dedimus*, or commission to take depositions, or to examine witnesses.

CHAPTER XX.

Masters in Chancery

§ 189. **Nature of the office.** A master in chancery is an officer of a court of equity, and acts as an assistant to the chancellors, performing both judicial and ministerial functions. His duties, though often judicial in character, are held in some jurisdictions to be ministerial duties, and not judicial. His duties and powers are governed by statutes, rules of court and the general practice of courts of chancery.

§ 190. **Duties of master.** The matters referred to a master by the chancellors vary. He may be ordered to do a particular ministerial act; as for instance to take the testimony in a case and report the same, or to take the testimony and report the same, together with his conclusions thereon. There is hardly any matter in a chancery cause which the chancellor may not refer to a master. It is the practice to refer to masters exceptions for scandal or impertinence, exceptions to an answer for insufficiency, the settling of interrogatories as to their relevancy, and all cases involving difficult accountings, or involving voluminous testimony.

§ 191. **Master's acts are limited by statutes, court rules, and the order of reference.** Statutes and chancery rules of court expressly invest a master with certain powers. Otherwise, a master can act only upon an order of reference entered by the court. The master must accept the order of reference as conclusive of all matters embraced therein. Where a bill is taken *pro confesso*,

and the cause is referred, defendant cannot offer defensive evidence before the master. The order of reference is to be construed together with the pleadings, and the master cannot entertain any claim, or decide any matter not embraced by the pleadings, nor can the master permit an amendment of the pleadings; that is for the court to do.

§ 192. **References to a master are subject to the court's discretion, except in a case involving an accounting or voluminous testimony.** References to a master are discretionary with the court, except when the suit involves a complicated accounting. In the latter case a reference is necessary, and a reference is also necessary where the testimony is voluminous and conflicting;¹ but not so where amount due under a contract is a simple matter; nor where there is a mere computation of payments and interest. In some jurisdictions, when a cause is at issue, the entire cause may be referred to a master to hear the evidence and arguments, and to report his findings upon the entire case. But in federal practice the court cannot refer all the issues to be passed upon by the master except upon consent of the parties.^{1a}

In federal practice, save in matters of account, a reference to a master is exceptional, and can be made only upon a showing that some exceptional condition requires it.^{1b}

§ 193. **Duty and power of master in federal courts.** In the federal courts the master has power to regulate all the proceedings in every hearing before him upon references; and he has full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers and other documents

1—Beale v. Beale, 116 Ill. 292.

1b—U. S. Eq. Rule 59.

1a—Kimberly v. Arms, 129 U. S.

applicable thereto; and also to examine on oath, *viva voce*, all witnesses produced by the parties before him, or by deposition, according to the Acts of Congress, or otherwise, as provided in the Equity Rules; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof, and the rights of the parties.²

The orderly and acceptable procedure is to present to the court all objections and questions arising before the master in the form of exceptions to his report.³ Witnesses living within the district may, upon notice to the opposite party, be subpoenaed to testify before the master.⁴ The admission and rejection of evidence rests within the sound discretion of the master.⁵ The party must proceed with the matter referred, within 20 days.⁷ It is the duty of the master to speed the matter referred.⁸

§ 194. Production of books and writings before master.

If the order of reference contains a direction that the parties produce before the master, upon oath, all books or writings in their possession or power relating to the matter of the reference, and that the parties be examined upon interrogatories, as the master shall direct, the words "as the master shall direct" apply to both branches of the direction, namely, to the production of deeds, and to the examination on interrogatories; and they are considered important as vesting the master with discretion upon the subject of production.⁹

2—U. S. Eq. Rule 62.

3—Lull v. Clark, 20 Fed. 455.

4—U. S. Eq. Rule 52.

5—U. S. Eq. Rule 62; Wooster v.

Gumbriner, 20 Fed. 167.

7—U. S. Eq. Rule 59.

8—U. S. Eq. Rule 60.

9—1 Barber 480.

§ 195. **Production under subpoena duces tecum, or under notice.** The master may order the production of books and papers by *subpoena duces tecum*, inserting the words: "And then and there bring with you and produce before said master all deeds, books, papers and writings in your custody or power relating to the matter of reference, and more especially the following."¹⁰ Or the production may be caused by taking out and serving a warrant or notice signed by the master and requiring the production of the certain books and writings.^{10a}

§ 196. **Master's discretion to order production is limited.** Although the language of the order of reference is general that the parties produce all books, papers, etc., the master is to exercise his discretion in determining what books and papers are necessary to be produced. The discretion of the master is limited by the rules which guide the court in compelling a discovery of books and documents in other cases.¹¹

§ 197. **Master may not permit withdrawal of exhibits.** The master has power to receive evidence, but cannot grant leave to withdraw exhibits even upon parties leaving copies thereof.¹² Therefore, the master should exercise caution in impounding books and writings belonging to third persons not parties in the suit, under the name of evidence in a cause.

§ 198. **Evidence before master.** In the absence of special restrictions, a master has power to receive evidence for the proper determination of any matter referred. A witness once examined, cannot be re-examined before the master, without an order therefor. The master should be personally present to examine witnesses. Where he has power to rule upon an objection to the evidence, he

10—*In re O'Toole Estate*, 1 Tuck.
29 N. Y.

10a—1 Barber 481.

11—1 Barber 481.

12—*Bolter v. Kozolwski*, 211 Ill.
79.

should rule thereon, to show how he will regard it in making his report;¹³ and even if the evidence seems to be inadmissible, the master (though ruling against its admissibility), should as a rule permit the evidence to go into the record subject to the objection and subject to his ruling, so as to avoid the necessity of a re-reference in case the court should deem the evidence admissible.¹⁴ Objections should specify the ground of objection and should be made when the evidence is offered. In most jurisdictions, if objections are overruled by a master, exceptions need not be taken to the master's ruling,¹⁵ and the master's rulings upon evidence can be reviewed by the court upon "exceptions to his report."¹⁶ An Illinois case to the contrary¹⁷ is based upon a contrary local rule of court¹⁸ which requires objections to the master's rulings upon evidence to be brought to the attention of the court before the master's report is filed. Evidence taken by one master cannot be considered by another master in some jurisdictions, but may be considered by the court.¹⁹

In federal practice, the master, probably like the court, must rule on the admissibility of all evidence offered and exceptions to his rulings must be preserved.^{19a}

§ 199. Nature of hearing before master. Upon a hearing before a master in chancery the parties have the same right to be heard, by themselves or by counsel, to introduce evidence, cross-examine witnesses, and to take the various steps authorized by law, as if the hearing was before the chancellor instead of the master.

13—*Berrian v. Sanford*, 1 Hun. N. Y. 625.

14—*Blease v. Garlington*, 92 U. S. 1; U. S. Eq. Rule 46.

15—*Swift v. Castle*, 23 Ill. 209.

16—1 Barb. 484.

17—*Dickinson v. Torrey*, 91 Ill. App. 297.

18—Cook County, Ill. Chan. Rule 2, Governing Masters in Chancery.

19—*Coel v. Glos*, 232 Ill. 147; *McMahon v. Rowley*, 238 Ill. 31.

19a—U. S. Eq. Rules 46, 62.

§ 200. **Notice of hearing before master.** It is necessary to give notice to the opposite party when testimony before a master is to be taken. A party is entitled to be present and listen to the testimony of a witness as it is detailed by him in chief, and then, or as soon thereafter as convenience will permit, to cross-examine him; and it does not cure the error of denying this opportunity, to allow him, at some subsequent day, to have the witness brought before the master in chancery for his cross-examination.^{19b}

§ 201. **Reference to state account.** Upon a reference to a master to take and state the accounts between parties, the court should first find and declare the rights of the parties, and the rule to be adopted in stating the account; and the examination should be according to such finding and such rule.²⁰ Each party should bring in his whole account, for the whole period for which he is accountable, in the form of debtor and creditor.²¹ The master should then ascertain from the parties or their counsel, by written acknowledgments, what items are agreed to, and what items are objected to, and the proper proofs should then be taken. Any party not satisfied with the accounting may examine the accounting party.²²

§ 202. **The master's report.** The master's findings and conclusions are embodied in a document called the master's report, which should show the proceedings under the order of reference, the evidence taken, and the findings of fact, and conclusions of law, reached by the master, in such form and manner that the court may intelligently act upon such report.²³

§ 203. **Form and sufficiency of report.** A master, directed to find facts, must report his findings of the ul-

19b—U. M. Life Ins. Co. v. Slee,
123 Ill. 94.

21—2 Dan. 878.

20—Remsen v. Remsen, 2 Johns.
Ch. 495.

22—U. S. Eq. Rule 63; 2 Dan.
878.

23—Schnadt v. Davis, 185 Ill. 476.

timate facts, and not items of evidence tending to establish them, nor mere conclusions of law. The report should not contain matters of argument or reasoning in support of its conclusions, but should disclose, where the matter would otherwise be doubtful, the basis of such conclusions, by reference to the pages of the evidence showing the testimony *pro* and *con*.

§ 204. The master should find as to each ultimate fact pleaded. A carefully drawn master's report should contain an express affirmative or negative finding, as to each material fact pleaded in a bill or answer, or a finding that a certain averment is not supported by any evidence, nor confessed in any pleading. If unable from the evidence to determine a fact, the master should find it against the party holding the affirmative.^{23a} After each finding, the master should cite the number of the page, or exhibit, containing testimony *pro* and *con*, bearing on the finding. Thus the report vindicates itself before the court.^{23b}

§ 205. Master must draw up his own report. The decree of a court is usually not written by the chancellor, but by one or more of the solicitors of the parties, and is signed by the chancellor after the opposing party has had opportunity to argue his objections thereto. But the parties are not permitted to draft the master's report. The master is compelled to draft his own report.²⁴

§ 206. But counsel may file briefs requesting particular findings. Counsel on either side, of course, has the right to draw up and file with the master a written brief and argument, stating the formal findings^{24a} of fact and

23a—Bradley v. McLaughlin, 8 Hun N. Y. 545.

23b—McMannomy v. Walker, 63 Ill. App. 278.

24—Fitchburg Steam Eng. Co. v. Potter, 211 Ill. 138.

24a—Keeley Co. v. Hargreaves, 236 Ill. 332.

of law, which the master is requested to find, together with references to the exhibits or pages of testimony, containing evidence, and citing the authorities bearing on findings of law requested. This accomplishes, in a formal and accurate manner, what every oral argument before a master does in an informal manner; and this procedure insures that the master will carefully consider granting or refusing each finding of fact or law requested. Such requests for specific findings may furnish a guide for later objections to the master's report.

§ 207. **Form of brief before master.** A lawyer's brief may properly contain (1) a request that the master make certain findings of fact, stating the findings substantially as alleged in the pleading, and referring to the pages of the evidence for and against each of such findings; also (2) a request that the master find certain conclusions of law, stating them exactly, and citing authorities.

§ 208. **Objection that certain findings were omitted.** It is important to object because the master omitted certain findings which might be in objector's favor. The objector's attention is often absorbed in the findings that appear in the report. In his desire to change these, and to have them agree with his view, he is likely to forget other proper findings, on issues entirely omitted from the report.

§ 209. **Method of objecting to master's report.** An objection that "the findings and each of them are not warranted by the evidence" is not sufficiently specific.²⁵ It seems in Illinois, objections need not recite or point out the evidence relied upon, but only need point out distinctly the *findings* and *conclusions* sought to be re-

²⁵—*Waska v. Klaisner*, 43 Ill. App. 611.

versed.²⁶ But in most jurisdictions an objector is required not only to point out the finding objected to, but also to state the ground of the objection.²⁷ It is also good practice for the objector to cite the pages of testimony, or the numbers of the exhibits, bearing on the subject-matter of the objection or exception, grouping together those supporting the master's finding, and then those against the finding.

§ 210. Exceptions in court to master's report. If, after hearing the objections, the master declines to modify his report, the parties insisting on such objections must file them again in court, under the name "Exceptions to the Master's Report," because the master's findings of fact are undisturbed in the absence of exceptions so filed. If objections are not filed before the master, exceptions will not be considered by the court. Exceptions should point out specifically the particular error upon which the excepting party relies. An exception calling for an examination of evidence must refer to and point out the evidence relied upon.

§ 211. Court's ruling upon exceptions should be specific. A decree or order disposing of objections to the master's report, should specify what exceptions were sustained, and what overruled, so that an appellate court may determine the basis of the decree entered.²⁸

§ 212. No objections or exceptions necessary to master's conclusions of law. But no objections are necessary to a master's findings or conclusions of law. These will be heard by the court without the filing of objections or

26—Hayes v. Hammond, 162 Ill. 133; McMannomy v. C. D. & V. R. Co., 167 Ill. 497.

27—1 Barb. 551; 2 Dan. 957; 2 Bates Fed. Eq. 821; Hurd v. Goodrich, 59 Ill. 455; Harding v. Handy, 11 Wheaton 103; Story v. Living-

ston, 13 Peters 359; Emerson v. Atwater, 12 Mich. 314; Singer v. Steele, 125 Ill. 429; Glos v. Hoban, 212 Ill. 222; Green v. Bishop, 1 Clifford 186.

28—Prendergast v. McNally, 76 Ill. App. 335.

exceptions.²⁹ It serves a very useful purpose, however, to file before the master formal objections to his conclusions of law, citing the authorities. It may induce him to conclude differently.

§ 213. **Court may make findings additional to those in master's report.** There is no rule of practice which forbids the court's making additional findings after the filing of a master's report if the evidence accompanying the report warrants and supports such additional findings. The court is not confined, in its review of the evidence, to the mere question of ascertaining whether the exceptions filed to the report, or any of them, should be sustained. When the master's report is returned into court, the party objecting to it may file exceptions, upon the hearing of which the whole evidence is brought forward and passes in review before the court.

§ 214. **Action of court on report.** The report of a master is not conclusive upon the court, even as to the facts found, but is subject to review by the court. It is generally held that the report of a master is presumptively correct, and that his conclusions of fact will not be disturbed unless error is made to appear. A finding upon conflicting evidence will rarely be disturbed. But in the federal courts, where the entire cause can be referred to a master only upon consent of the parties, and where therefore some references are by consent, and others (where particular points and not the whole case is referred), are compelled by the court, a distinction is made. In references by consent, the report is presumptively correct; in other ordinary references, the report is advisory, merely.

§ 215. **Confirmation of master's report.** In some jurisdictions, by court rule or statute, the report will be

deemed confirmed unless exceptions are filed within a stated time.³⁰ In most jurisdictions an express order is entered confirming the master's report. Confirmation may be implied, as by an order overruling exceptions to the report, or by the entry of a decree based upon the report. An order of confirmation is interlocutory and subject to modification; it is not a final order or adjudication. The confirmation may be set aside for cause.

30—U. S. Eq. Rule 66.

CHAPTER XXI

Injunctions

§ 216. **Definition.** An injunction is a writ granted by a court commanding an act to be done which the court regards as essential to justice (mandatory injunction), or forbidding an act which it deems against justice (preventive injunction).

§ 217. **Temporary injunction.** Injunctions are (1) preliminary or interlocutory, or (2) perpetual. The first are granted prior to the final hearing and continue until answer or until final hearing, or until further order of the court. They do not determine the rights of the parties. Their purpose is to hold the property as it stands, to prevent further injury, until the right itself is determined. If a preliminary injunction gives practically all the relief that could be obtained by a final decree, it will not be issued, nor should it be issued where the injurious acts have been completed, nor where no injury will occur. A preliminary injunction is also called a temporary injunction, or an injunction *pendente lite*.

§ 218. **Perpetual injunction.** A perpetual injunction is one which perpetually enjoins, and is usually granted in a final decree after trial of the entire cause.

§ 219. **Restraining orders in federal courts.** Whenever notice is given of a motion for an injunction out of a district court of the United States, the court or judge thereof may, if there appear to be danger of irreparable injury from delay, grant an order restraining the act

sought to be enjoined until the decision upon the motion. Such order may be granted with or without security, in the discretion of the court or judge.¹

§ 220. Preliminary injunctions and temporary restraining orders in the federal court. In the federal court no preliminary injunction can be granted without notice to the opposite party. Nor can any temporary restraining order be granted without notice to the opposite party, unless it clearly appears from specific facts, shown by affidavit or by verified bill, that immediate and irreparable loss or damage will result to the applicant before the matter can be heard on notice. In case a temporary restraining order is granted without notice, the matter must be made returnable at the earliest possible time not later than ten days from date of the order, and when the matter comes up for hearing the party who obtained the restraining order must proceed with his application for a preliminary injunction or the restraining order will be dissolved. Upon two days' notice the opposite party may move the dissolution or modification of the restraining order.²

In most jurisdictions, no injunction will be granted without previous notice of the time and place of the application having been given to the defendants who can conveniently be served; unless it appears from the bill or affidavit accompanying the same that the rights of the complainant will be unduly prejudiced if the injunction is not issued immediately or without such notice; and before an injunction shall issue, complainant as a rule, is required to give a bond for the protection of those enjoined.

§ 221. Bill must show an existing right, and its impending violation. The bill for injunction must show that the acts sought to be prevented will be a substantial

1—U. S. Judicial Code, Act Mar. 3, 1911. 2—U. S. Rule 73.

violation of complainant's clear right and not a mere inconvenience to complainant's right. The right asserted by complainant must be free from doubt where the preliminary injunction will do more than merely maintain the *status quo*, or where the injunction will cause greater loss and inconvenience than will be suffered by complainant if no injunction be granted; and for a preliminary injunction, the bill must show that an irreparable injury is impending and will occur before the final hearing can be had.

A chancery decree acts *in personam*, and a court having jurisdiction of the parties may grant and enforce an injunction, although the subject-matter affected by it is beyond the territorial jurisdiction of the court.³

3—Alexander v. Tolleston Club,
110 Ill. 65.

CHAPTER XXII

Receivers

§ 222. **Definition.** A receiver is an officer of the court through whom the court takes possession of property which is the subject-matter of a pending¹ suit, preserves it from waste, destruction or loss, manages the same, secures and collects the proceeds, and ultimately disposes of the property and proceeds according to the rights of those entitled thereto, whether they are regular parties in the suit, or come in during the course of the proceedings and establish their rights.

§ 223. **Situs of property.** A receiver may be appointed for all property within the jurisdiction of the court, whether or not the owner is within such jurisdiction;² and a receiver may be appointed for the express purpose of preventing the removal beyond the jurisdiction of property within the jurisdiction of the court.³

§ 224. **Object and grounds for appointment.** The bill should show the need for a receiver to preserve the property which is the subject-matter of the suit, until a judicial determination of the rights of the parties thereto.⁴ The principal ground is danger of loss or injury to such property before the court can decree finally on the merits. If there is no showing of probable danger of loss or injury to the property involved, no appointment will be

1—Baker v. Adm. of Backus, 32 Ill. 79.

2—Hutchinson v. American Palace Car. Co., 104 Fed. Rep. 182.

3—Loaiza v. Superior C. T., 85 Cal. 11.

4—Davis v. Gray, 16 Wall. 203.

made.⁵ The court will not appoint a receiver unless it is shown that the possessor is insolvent, or at least that there is good reason to doubt his ability to satisfy a judgment for damages for loss or injury to the property;⁶ but insolvency is not sufficient as a sole ground for the appointment of a receiver⁷ except in foreclosure cases.⁸ Where insolvency is likely to result in a loss of the fund or property in controversy, a receiver may be appointed on the ground of insolvency.⁹

It is a high exercise of power for a court of chancery to place property in the custody of a third person, and a court will do so only when it is made to appear that the property will probably be wasted, secreted or misapplied.¹⁰

§ 225. Receiver will not be appointed where there is a remedy at law. The appointment of a receiver is a remedy of equitable origin and jurisdiction, and to maintain it there must exist no remedy at law.¹¹ A receiver will not be appointed when the suit is upon a mere question of legal right,¹² or when the party can assert his right by a direct action at law. A receiver will not in general be appointed where the creditor may have execution and recover his debt by sale of the debtor's property.¹³

Plaintiff to obtain a receiver must show he has a clear right to the property, or that he has some lien upon it,

5—Beecher v. Bining, 7 Blatchf. U. S. 170; Bush v. Mattox, 110 Ga. 472.

6—Haines v. Carpenter, 1 Woods U. S. 266.

7—Onondaga Trust Co. v. Sparta Water Wks. Co., 91 Fed. 324.

8—Hughes v. Hatchett, 55 Ala. 634.

9—Ryder v. Bateman, 93 Fed. Rep. 16.

10—Crombie v. Order of Solan, 157 Pa. St. 588.

11—Wanneker v. Hitchcock, 38 Fed. Rep. 383.

12—Rollins v. Henry, 77 N. C. 469.

13—Parker v. Moore, 3 Edw. N. Y. 234.

or that the property constitutes a special fund for the satisfaction of his claim.

§ 226. Receiver's control over property. A receiver is entitled to take possession and control of property or funds involved, and to manage and dispose of the same under the directions of the appointing court. He cannot transfer the control and management to another.¹⁴ The mere order of appointment does not constitute actual possession of the property; ¹⁵ actual possession must be taken by the receiver. Property in the receiver's hands is exempt from judicial process as a rule, except as permission can be given by the appointing court.¹⁶

A receiver has no authority in any state or country other than that in which he was appointed, and his authority will not be recognized elsewhere.¹⁷ He is incompetent to sue in a foreign jurisdiction, just as an executor or administrator appointed in one state has no authority to bring suit in any other. Some cases, however, have held to the contrary.¹⁸

§ 227. Bond instead of receiver. Where the person in possession of property or receiving rents from property offers to execute a bond to secure the person seeking a receiver from any loss pending the suit, a receiver will not as a rule be appointed.¹⁹

§ 228. Bonds to be furnished. In most jurisdictions the party applying for the receiver must furnish a bond to protect the adverse party against damages which may result from the appointment and acts of the receiver, in the event that the appointment is revoked. The receiver must also furnish a bond for the faithful performance of his duties.

14—Shadewald v. White, 74 Minn. 208.

15—Woodland Bank v. Heron, 120 Cal. 614.

16—Jackson v. Lahee, 114 Ill. 287.

17—Booth v. Clark, 17 How. U. S. 322, 330.

18—High on Receivers, Sec. 241.

19—Devereaux v. Fleming, 47 Fed. Rep. 177.

§ 229. **Receivers of corporations.** A court, as a rule, will not by a receiver take the control and management of the corporation out of the hands of its officers and directors;²⁰ but if a corporation is insolvent and has suspended operations, a receiver may be appointed to protect its creditors and stockholders.²¹ Also, when a corporation is dissolved and has no place of business and no officers to attend to its business, a receiver may be appointed to preserve the assets.²² By the appointment of a receiver the corporation is deprived of the right to exercise its powers only to the extent that the decree of the court transfers such powers to the receiver.

§ 230. **Obtain leave to sue receiver.** The rule is that in the absence of a statute to the contrary no suit can be brought against a receiver without permission from the appointing court.²³ It rests in the discretion of the court to allow a party to bring an independent action against the receiver, or to compel him to proceed in the suit in which the receiver was appointed.²⁴ Leave to sue a receiver is granted as a matter of course, unless it is clear that there is no foundation to the claim. Failure to obtain leave of court before suing a receiver is merely an irregularity, which, though punishable as a contempt, may be cured or waived at any state of the proceedings.²⁵ The plaintiff in such action only renders himself liable to have his proceedings stopped by the appointing court on the application of the receiver, by action against the plaintiff personally.²⁶

Inasmuch as the receiver is an officer of the court, any

20—*Ranger v. Champion Cotton Press Co.*, 52 Fed. Rep. 609.

21—*McGeorge v. Big Stone Gap Imp. Co.*, 57 Fed. 262.

22—*Midland Co. v. Anderson*, 63 Ill. App. 51.

23—*Barton v. Barbour*, 104 U. S. 126.

24—*Mechanic's Nat. Bank v. Landauer*, 68 Wis. 44.

25—*De Groot v. Jay*, 30 Barbour N. Y. 483.

26—*Lyman v. Central Vermont R. Co.*, 59 Vt. 167.

unlawful interference with him in the performance of his duties, or in his possession of the property, is deemed a contempt of the court, and will be punished as such.²⁷

27—*In re Higgins*, 27 Fed. Rep.
443.

CHAPTER XXIII

Forms

THE NINE USUAL PARTS OF A BILL.

1.

I. THE ADDRESS.

(In the District Court of the United States).

To the Judges of the District Court of the United States for the
District of

(In States.)

To the Judges of the Court of County, in
Chancery sitting:

2.

II. THE INTRODUCTION.

(By a complainant under no disabilities.)

INTRODUCTION.

A. B., a citizen of the state of, residing in
county in said state brings this bill against C. D., a citizen of the
state of, residing in county in said state, and
E. F., a citizen of the state of, residing in
county, in said state; and complains and avers as follows:

Note. From the fact that the courts of the United States are
of limited jurisdiction and suits must be brought in the dis-
trict where the defendant resides, and from the fact that in
most jurisdictions the defendants must be sued in the county
where they reside, it follows that the existence of jurisdiction
should be made plain upon the face of the record in each
case, or the bill will be demurrable, or may be dismissed
by the court on its own motion. This can be accomplished by
stating the citizenship, naming the county of which the parties
are residents.

(By an infant by his father and next friend.)

Your orator, A. B., of the county of, an infant, by
E. B., of the same county, his father and next friend, respect-
fully represents unto your honor that, etc.

(By a corporation.)

Your orator, the Company, a corporation duly estab-
lished by the laws of the State of, and duly licensed
to do business in, respectfully represents unto your
honor that, etc.

3. III. THE PREMISES OR STATING PART.

That, etc. (Here insert all the facts constituting complainants' rights, and all the facts constituting the defendants' duties and violation of the complainants' rights. (See text ante "stating part of bill").

4. IV. THE CONFEDERATING PART.

(This part should be omitted.)

That the said C. D., combined and confederated with E. F. and G. H., and with divers other persons, at present unknown to your orator, whose names, when discovered, your orator prays he may be at liberty to insert herein with apt words to charge them as parties defendant hereto;

5. V. CHARGING PART.

(This part of the bill may also be omitted, unless pleader desires to anticipate the defenses and to meet them with counter-charges or unless the pleader desires to allege part of his cause of action again, in the form of *evidential* facts which he thinks the answer cannot evade.)

That the defendant sometimes alleges and pretends (stating the supposed ground of the defense), and at other times he alleges and pretends, etc.; whereas, your orator charges the contrary thereof to be the truth, and that (stating the special matter with which the plaintiff meets the defendant's supposed case).

And more particularly complainant charges, that on or about Sept. 1, 1899, defendant James Brown in Chicago made, signed, sealed and delivered his certain writing in words and figures substantially as follows:

6. VI. JURISDICTIONAL CLAUSE.

(This clause should be omitted, as unnecessary.)

Your orator further avers that the said rights of your orator are remediless, according to the strict rules of the common law, and can only have relief in a court of equity, where matters of this nature are properly cognizable and relieviable.

or,

Forasmuch as your orator is without remedy except in a court of equity and, and

7. VII. INTERROGATING PART.

(General interrogatory.) To the end, therefore, (or, your orator prays) that the defendants hereinafter named may make full, true, direct and perfect answers (but not under oath, answer under oath being hereby waived) to all the matters herein

stated and charged, as fully and particularly as if the same were hereinafter repeated, and they thereunto distinctly interrogated; and that not only as to the best of their respective knowledge and remembrance, but also according to the best of their respective information and belief; (Special interrogatories) and more especially, that they may answer and set forth.

1. Whether, etc. (Here follow interrogatories to be answered by the defendant.)

2. Whether, etc.

8.

VIII. PRAYER FOR RELIEF.

And (or, your orator prays) that upon the final hearing of this cause it be ordered and decreed, among other things that (here state the particular relief asked);

And that your orator may have such other and further relief in the premises as may be just and equitable.

9.

IX. PRAYER FOR PROCESS.

(PRAYER FOR SUMMONS.)

May it please your honor to grant the writ of summons in chancery, directed to the sheriff of the said county of, commanding him that he summon the defendant, C. D., to appear before the said court, on the first day of the next term thereof, to be held at the court house in, in the county of, aforesaid, and then and there to answer this bill, etc.

10.

(PRAYER FOR SUBPOENA IN U. S. COURT.)

May it please your honor to grant unto your orator the writ of subpoena of the United States of America, issued out of and under the seal of this honorable court, to be directed to the said C. D., and thereby commanding them, and every one of them, at a certain day and under a certain penalty, therein to be specified, personally to be and appear before this honorable court, and then and there to answer all and singular the premises (but not under oath except in response to the special interrogatories above, otherwise answer under oath is hereby expressly waived) and to stand to, perform and abide such order and decree therein, as to your honor shall seem meet.

In the older forms the jurisdictional, interrogatory, relief and process clauses, form one grammatical sentence: Thus;

Forasmuch as your orator is without relief except in a court of equity, and

To the end that said defendant may answer this bill, and

That the court may decree that said defendant, among other things, come to a just account, etc., and that your orator may have such other and further relief as may be equitable;

May it please your honor to grant unto your orator the writ of subpoena, etc.

Thus, the interrogatory part is as much entitled to be called a prayer for answer as the relief clause is to be called a prayer for relief. They recite the object or purpose for asking process.

In modern bills, the jurisdiction clause is omitted and answer and relief are each directly prayed for. Thus;

Your orator therefore prays that said defendant answer this bill, etc.

And your orator prays that said defendants among other things, come to a just and true account with your orator, etc.; and that your orator may have such other and further relief as may be equitable.

11. PRAYER FOR INJUNCTION.

(After the prayer for summons or subpoena as in the two last forms, add the following:)

And may it please your honor to grant unto your orator the people's writ of injunction, to be directed to the said C. D., restraining him, his employes and agents, etc. (here insert the matter sought to be enjoined), until the further order of said court.

12. PRAYER IN BILL FOR WRIT OF NE EXEAT.

May it please the court to grant unto your orator the writ of *ne exeat*, issuing out of and under the seal of this honorable court, to restrain the said defendant, C. D., from departing out of the jurisdiction of this court.

13. CHANCERY SUMMONS.

State of }
..... County. } ss.

The People of the State of To the Sheriff of said County, Greeting:

We command you that you summon if he shall be found in your county, personally to be and appear before the court of Cook county, on the first day of the term thereof, to be held at the court house, in said county, on the first Monday of, next to answer unto in certain Bill of Complaint filed in said court, on the chancery side thereof.

And have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness,, clerk of our said court, and the seal thereof,
at, in said county, this day of, A. D.
19...

.
Clerk.

14. BILL OF COMPLAINT (Short Form).

In the United States District Court in and for the
district of, term, 19...

To the Judges of the District Court of the United States for the
. district of:

A. B., a citizen of the state of, residing in
county in said state, brings this his bill against C. D., a citizen
of the state of, residing in county in the state
of; and E. F., a citizen of the state of, residing
in county in the state of, and G. H. a male
infant under 21 years of age, residing in county in
the state of;

And thereupon your orator complains and says that, etc.
(*Here state briefly the ground on which the court's jurisdiction
depends.*)

And your orator says (*here insert statement of the ultimate
facts upon which complainant asks relief.*)

And your orator says (*here state why those who appear to
be proper parties, are not named as such; as absence from the
jurisdiction, etc.*)

To the end that your orator may obtain the relief to which he
is entitled in the premises, he now prays the court to grant him
due process by subpoena directed to said C. D. and E. F.,
defendants hereinbefore named, requiring and commanding each
of them to appear herein and answer under oath (*or, but not
under oath, the same being expressly waived*) the several alle-
gations in this your orator's bill contained.

And your orator further prays that upon the final hearing it
be ordered and decreed that (*here insert the special relief
sought pending the suit, if any; in which case the bill must be
sworn to*).

And further prays for such other and further relief as may
be just and equitable.

14A. BILL TO FORECLOSE TRUST DEED.

To the Honorable, Judge of the
Court of, State of

Humbly Complaining unto said Court, Your Orator,
of the City of, in County, State of,
brings this bill against, of, in the County of
., and State of respectfully shows that on the

..... day of, A. D., of, in the County of, and State of, being indebted in the sum of Dollars, made, executed and delivered his certain promissory note of that date, and thereby promised to pay to the order of, the said sum of money in years after the date thereof, with interest thereon at the rate of per centum per annum until maturity, payable semi-annually, for which said interest, interest notes were given, and all of said notes draw interest after their maturity at the rate of seven per centum per annum. Copies of which said notes remaining unpaid are annexed as exhibit A.

And Your Orator.. further shows unto said Court, that to secure the payment of the notes above mentioned, the said, on the day of, A. D., by their deed of trust of that date, conveyed to, in fee simple, the following described real estate, with the appurtenances thereunto belonging, situated in the County of, and State of, to-wit:, in trust, for the purpose of securing the payment of the said notes; which said deed of trust was, on the day of, A. D., duly acknowledged and delivered, and afterwards, on the day of, A. D., duly filed for record in the Recorder's Office in and for said County, and recorded as Document No., in Book of Records, at page, a copy which of which trust deed is hereto annexed as exhibit B.

And Your Orator.. further shows unto said Court, that is now the legal holder and owner of said notes and trust deed.

And Your Orator.. further shows unto said Court, that is the trustee named in said trust deed, and as such is a party hereto, to the end that the lien of said trust deed may be fully foreclosed, and that all of the terms and provisions of said trust deed may be enforced, and all of the debts secured to be paid thereby, may be fully paid out of the proceeds of the sale of said real estate, and the rent, revenue and income thereof.

And Your Orator.. further shows unto said Court, that it is provided in said trust deed, that if default should be made in the payment of the said promissory notes, or either of them, or the interest thereon, or any part thereof, or in case of waste or non-payment of taxes or assessments, or neglect to procure or renew insurance, or in case of the breach of any of the covenants or agreements therein contained, then, and in such case, the whole of such principal and interest secured by the said promissory notes, should thereupon, at the option of the legal holder thereof, become immediately due and payable; and said trust deed might then be immediately foreclosed to pay the same, and

that the said trustee might then enter upon said real estate and collect the rents, issues and profits arising therefrom, and apply them as stated in said trust deed.

And Your Orator.. further shows that sundry taxes and assessments levied and assessed upon said real estate, have become due and remain unpaid, as follows:.....

And Your Orator.. further shows that said real estate was sold on account of the non-payment of taxes and assessments, which sales were made at the dates and for the amounts as follows:.....

And Your Orator.. further shows that said has paid the sums of money at the dates mentioned, as follows, in and about relieving said real estate from sundry liens thereon for taxes and assessments, to-wit:.....

And Your Orator.. further shows that default was made by the said grantors in said trust deed in the matter of insurance, specified in said trust deed, and said has paid the sums of money, and at the dates hereinafter stated, for the purpose of and in and about providing insurance as is required in and by said trust deed, to-wit:

And Your Orator.. further shows that items of expense for taxes, assessments and insurance, and other matters, which by the terms of said trust deed should be paid, are liable to accrue and should be paid during the pendency of this cause, and that such items of expense, if any there shall be, and which shall be paid by your Orator.. during the pendency of this cause, should be included in the decree to be rendered in this cause.

And Your Orator.. further shows that are in the occupancy of said real estate, or some part thereof, as tenants of the grantors in said trust deed, and your Orator.. avers that such persons have no right, title or interest in said real estate which is not subject to the prior and superior lien of said trust deed.

And Your Orator.. further shows that are or claim to be judgment creditors of said grantors, or one of them, mentioned in said trust deed, and your Orator.. avers that the claims, demands and judgments of all of said persons are inferior to and are subject to the lien of said trust deed sought to be foreclosed herein.

And Your Orator.. further shows that are or claim to be interested in said real estate as the owners or holders of liens thereon, secured by encumbrances thereon, or otherwise, and your Orator.. avers that all such liens, if any there be, are inferior to and are subject to the lien of the trust deed sought to be foreclosed herein.

And Your Orator.. further shows that the whole of the principal and interest on the said notes has become due and payable by reason of

And that the sum of Dollars, with interest thereon

at the rate of per centum per annum from the day of A. D., is now due and unpaid to said on the said principal note.

And that the sum of Dollars, and the interest thereon at the rate of per centum per annum, from is due and unpaid to said for said interest note, due as aforesaid, on the day of, A. D.

And that the sum of Dollars, with interest thereon at the rate of per centum per annum from, is due and unpaid to said for money paid to relieve said real estate from the lien of the taxes and assessments thereon, and other items of expense and interest thereon, as follows, to-wit:

That under and pursuant to the terms and agreements of said trust deed, your Orator., said, is entitled to have the fees of the complainant's solicitors herein paid out of the proceeds of the sale of said real estate, and under and by virtue of said trust deed there is due to your Orator., said, the sum of Dollars for attorney's and solicitor's fees for services in this cause.

That under and pursuant to the terms and provisions of said trust deed, your Orator.. has expended the sum of Dollars in and about procuring a continuation of the abstract of the title to said real estate, for use in these proceedings, which last mentioned sum of money your Orator.. avers should be allowed as part and parcel of the debt secured to be paid by said trust deed, and be included in the amount of the decree to be rendered in this cause.

And Your Orator.. further represents and charges, that the said real estate described in said trust deed is meager and scant security for the payment of the sum of Dollars now due, as aforesaid, to your Orator., said, under and by virtue of said notes and trust deed.

Your Orator.. therefore, asks the aid of said Court in the premises, and makes the said defendants to this bill of complaint, and to the end that they may be required to answer this, your Orator.. bill of complaint, according to the rules and practice of said Court, without oath, their and each of their answers on oath being hereby waived; that a receiver may be appointed upon the filing of this bill, as is stated in said trust deed; that an account may be taken in this behalf by or under the direction of said Court; that the said defendant, may be decreed to pay your Orator.. said, whatever sum shall appear to be due to him upon the taking of such account, together with said solicitor's fees and all the costs of this proceeding, by a short day, to be fixed by the said Court; that in default of such payment, the said real estate may be sold, as may be directed by the said Court, to satisfy the amount due for prin-

cipal and interest on the said notes and for the said other items due under said trust deed, and for said solicitor's fees, and all the said cost; that in case of such sale, and in failure to redeem therefrom, pursuant to the statute, the defendants, and all persons claiming through or under them subsequent to the commencement of this suit, may be forever barred and foreclosed of all right and equity of redemption in the said real estate; that your Orator may have execution against the said defendant for any balance that shall remain due to your said Orator.. of the principal and interest of said notes, and under said trust deed, if the sale of said real estate fail to produce sufficient to pay the whole of said debts, solicitor's fees and costs, and that your Orator.. may have such other and further relief as the nature of his case may require, and as to said Court shall seem agreeable to equity and good conscience.

May it Please Said Court to grant unto your Orator the writ of summons in chancery, issuing out of and under the seal of said Court, directed to the of the said of, commanding him that he summon the said defendants to appear before the said Court, on the first day of the next term thereof, to be held at the Court House in the of aforesaid, then and there to answer all and singular the premises, and to stand to and abide by and perform such order and decree therein as shall seem agreeable to equity and good conscience.

And Your Orator.. will ever pray, etc.

.....

Solicitors for Complainant

15.

PRAECIPE FOR PROCESS.

(*Title of court and cause.*)

To clerk of said court:

In above cause, being a bill filed for (*here state briefly purpose of bill, as for foreclosure of mortgage, or to set aside conveyance of realty*), please issue a subpœna to C. D. and E. F., defendants.

Solicitor for Complainant.

If for any reason it is desired to issue separate subpœnas the *praecipe* should so direct.

16.

PRAECIPE FOR COMMISSION ON INTERROGATORIES.

(*Title of court and cause.*)

To clerk of said court:

In above entitled cause in equity please select some proper per-

son as commissioner and issue a *dedimus* to him authorizing him to take the testimony of F. G. and H. K., upon the interrogatories filed in your office for that purpose. Witnesses reside at

Solicitor for

17. PRAECIPE FOR SUBPÆNA TO WITNESS.

(*Title of court and cause.*)

To clerk of said court:

In above entitled cause in equity please issue subpœna to F. G., a witness on behalf of, directing him to appear and testify before, commissioner, at, on the.....

Solicitor for

18. RETURN.

(*In the Federal Court:*)

United States Marshal's Office, }
..... District of }

I hereby certify that I received the within writ on the day of, 19.., and personally served the same on the day of, 19.., by delivering to and leaving with, said defendant named therein, at the city of, in said district, an attested copy thereof.

....., 19...

N. O.,

United States Marshal,

By, Deputy.

19. APPEARANCE—GENERAL.

(*Title of court and cause.*)

To J. A. C., clerk of said court:

I hereby enter the appearance of A. B., defendant in the above-entitled cause, and of myself as his solicitor.

E. F.,

Solicitor for Defendant A. B.

Dated January 10th, A. D. 1902.

20. APPEARANCE IN PERSON.

(*Title of court and cause.*)

To clerk of said court:

Please enter my appearance as defendant in above cause on the day (*or as of the date of the filing hereof*).

.....

21. SPECIAL OR LIMITED APPEARANCE.

(*Title of court and cause.*)

Now comes J. N., who is named in the bill of complaint as one of the defendants in the above-entitled cause, and enters special and limited appearance in this cause, for the sole purpose of objecting to the jurisdiction of the court, and for the purpose of moving to quash the alleged service and for no other purpose; and, for grounds of said motion to quash said alleged service, said defendant shows to the court: (set forth objections to jurisdiction).

C. & F., Defendant.
Solicitors for Defendant, J. N.

22. DEFAULT ORDER WHERE SERVICE BY PUBLICATION.

(*Title of court and cause.*)

It appearing to the court that the defendant, Richard Roe, has been duly notified of the pendency of this cause, by publication, and by mailing the same to him, pursuant to the statute in such case made and provided, on motion of complainant's solicitor.

It is ordered, etc. (See form No. 25.)

23. DEFAULT ORDER WHERE THERE IS AN APPEARANCE.

(*Title of court and cause.*)

It appearing to the court that the defendant, A. B., has filed his appearance herein, and has failed to answer the bill of complaint herein, on motion of complainant's solicitor,

It is ordered, etc.

24. DEFAULT ORDER ON WITHDRAWAL OF ANSWER.

(*Title of court and cause.*)

On motion of the solicitor for the defendant, A. B.,

It is ordered that leave be, and the same is hereby, given the said defendant to withdraw his answer heretofore filed in this cause, and the same is hereby withdrawn.

And it appearing to the court that the defendant has failed to answer the bill of complaint in this cause, on motion of complainant's solicitor,

It is ordered, etc.

25. ORDER OF DEFAULT AND PRO CONFESSO.

(*Title of court and cause.*)

It appearing to the court that due personal service of has been had on the defendant, A. B., at least days before the, being the return day of said, on the motion of complainant's solicitor.

It is ordered by the court that the defendant above named be, and he is hereby, required to plead, answer, or demur, *instantly*, to the bill of complainant filed in this cause; and no plea, answer, or demurrer, or other matter of defense being interposed herein by the said defendant, and he being now here three times solemnly called in open court, comes not, nor does any person for him, but herein he makes default, which is, on motion, ordered to be taken, and the same is herein entered of record.

And it is ordered that the said bill of complaint be, and the same is hereby, taken *pro confesso* against the said A. B., for want of his answer thereto.

26. AFFIDAVIT IN SUPPORT OF MOTION TO SET ASIDE
ORDER PRO CONFESSO.

(*Title of court and cause.*)

A. B., the above-named defendant, makes oath and says that (*state facts showing there was no negligence in failing to answer and also showing meritorious defense to the bill*). Affiant therefore prays that the default heretofore entered in this cause against him may be set aside, and that he may be permitted to file his answer herewith exhibited, a copy of which is hereto attached, and marked "Exhibit A," and made a part hereof, which answer he now offers to file in this cause.

Subscribed and sworn to, etc.

A. B.

27. ORDER VACATING DEFAULT AND ORDER PRO
CONFESSO.

(*Title of court and cause.*)

This cause having come on to be heard, upon the motion of A. B., defendant herein, to set aside the default and decree *pro confesso* herein, and on the affidavit filed in support of said motion, and the proposed answer to be filed herein, and the court being fully advised in the premises, on motion of the solicitor for the said defendant.

It is ordered, adjudged, and decreed that the said default and decree *pro confesso* herein be, and the same are hereby vacated and set aside, and that said defendant be allowed, and leave is hereby given him to file his answer to said bill of complaint. (If any terms are imposed as a condition to setting aside the default, state them.)

28. PETITION FOR APPOINTMENT OF GUARDIAN
AD LITEM.

(*Title of court and cause.*)

To the Honorable the Judges of the Court of,
in Chancery Sitting:

Your petitioner, X. Y., respectfully represents that he is the complainant in the above-entitled cause; that the defendant, A. B., is a male infant or minor under the age of twenty-one years; that a duly issued out of this court on the day of, A. D., returnable to the term of this court, A. D., directed to the of, commanding him that he the said defendant, A. B., and that said was duly served by the of on the said A. B. by delivering a true copy thereof to him on the day of, A. D., being more than days before the return day thereof; that said defendant, A. B., has not appeared in this cause; that no guardian *ad litem* has been appointed for said A. B., and no application for the appointment of a guardian *ad litem* has been made by or on behalf of said infant; and that said A. B. resided with his father, J. B., at the city of, in the county of, in the state of

Your petitioner therefore prays that some fit and suitable person may be appointed by the court as guardian *ad litem* of said defendant, A. B., in this suit, to appear and defend the said suit for the said A. B.

.....
Petitioner.

J. G.,
Solicitor for Petitioner.
(Conclude with verification as in bill.)

29. ORDER APPOINTING GUARDIAN AD LITEM.

(Title of court and cause.)

On reading and filing the petition of the complainant for the appointment of a guardian *ad litem* for the defendant, A. B., and it appearing to the court that a duly issued out of this court on the day of, A. D., returnable to the term of this court, A. D., directed to the of, commanding him that he the defendant, A. B., and that said was duly served by the of on the said A. B. by delivering a true copy thereof to him on the day of, A. D., being more than days before the return day thereof, and it further appearing to the court that the said defendant, A. B., is a male infant or minor under the age of twenty-one years; that said A. B. has not appeared in this cause; that no guardian *ad litem* has been appointed for said A. B., and no application for the appointment of a guardian *ad litem* has been made by or on behalf of said A. B.; and that the said A. B. and his father, J. B., have been duly served with a copy of said petition, and have had due notice of this motion; and that E. R.

has consented to act as guardian *ad litem* of said A. B. On motion of complainant's solicitor,

It is ordered that E. R., a solicitor of this court, and a fit and suitable person, be, and he is hereby, appointed guardian *ad litem* of said defendant, A. B., in this suit, and is authorized to appear and defend the said suit for the said A. B. as said guardian *ad litem*.

30.

A SPECIAL AND GENERAL DEMURRER.

(*Title of court and of cause.*)

The demurrer of C. D., defendant, to the bill of complaint of A. B., complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint contained, to be true, in such manner and form as the same are therein and thereby set forth and alleged, demurs to said bill, and for cause of demurrer shows, that, etc.

(Here set forth the special cause of demurrer.)

Also that the complainant has not, in and by his said bill, made or stated such a case as entitles him, in a court of equity, to any discovery or relief from or against this defendant touching any of the matters contained in the said bill.

Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, this defendant demurs to the said bill, and to all the matters and things therein contained, and prays the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill and he prays to be dismissed with his reasonable costs in this behalf sustained.

.....
By, Solicitor for Defendant.

31.

GENERAL DEMURRER.

(*Title of court, of cause, and address to judges.*)

The demurrer of C. D. and E. F., defendants.

These defendants, not confessing all or any of the matters in the bill of complaint contained to be true as therein set forth, do demur to said bill, for that the same does not state such a case, nor contain any matter of equity, entitling the complainant to any relief against these defendants. Wherefore they pray the judgment of the court whether they shall be compelled to further answer said bill, and further pray to be dismissed with their costs.

.....
.....

32. SPECIAL DEMURRER TO BILL.

(Title of court, of cause, and address to judges.)

The demurrer of C. D. and E. F., defendants.

These defendants, not confessing all or any of the matters and things in the bill of complaint contained to be true as therein alleged, do demur to said bill, and for cause thereof sheweth that, etc. *(here set forth specifically the grounds of demurrer)*.

Wherefore they pray the judgment of the court whether they shall be compelled to further answer said bill. And further pray to be dismissed, with costs.

33. DEMURRER TO PART OF BILL.

(Title of court, of cause, and address to judges.)

The demurrer of C. D. and E. F. to part of bill.

These defendants, not confessing all or any of the matters and things in the bill of complaint contained to be true as therein alleged, do demur to so much of said bill as *(here describe the part or parts of bill demurred to, and set forth the grounds of demurrer thereto)*.

Wherefore defendants pray the judgment of the court whether they shall be compelled to further answer make to said parts of the bill herein demurred to.

34. DEMURRER FOR WANT OF PARTIES.

(Title of court, of cause, and address to judges.)

The demurrer of C. D. and E. F., defendants.

That it appears by the complainant's bill, that C. D., therein named, is a necessary party to the said bill, inasmuch as it is therein stated, that X. Y., the testator in the said bill named, did, in his lifetime, by certain conveyances made to the said C. D., in consideration of dollars, convey to him by way of mortgage, certain estates, in the said bill particularly mentioned and described, for the purpose of paying the said testator's debts and legacies; but the complainant has not made the said C. D. a party to said bill.

Wherefore, etc.

35. DEMURRER FOR MULTIFARIOUSNESS.

(Title of court, of cause, and address to judges.)

The demurrer of C. D. and E. F., defendants.

That it appears by the said bill that the same is exhibited against this defendant, and the several other persons therein named as defendants thereto, for distinct matters and causes, in several whereof, as appears by the said bill, this defendant is not in any manner interested or concerned, and that the bill is altogether multifarious.

Wherefore, etc.

36. DEMURRER OR MOTION TO DISMISS, PLEA, AND ANSWER IN ONE (Federal Court).

(Title of court, of cause, and address to judges.)

Demurrer, plea and answer of E. F. and C. D., defendants.

I. These defendants, not confessing all or any of the matters and things in said bill contained to be true as therein alleged, do demur to said bill, and for cause of demurrer do show that *(here set forth grounds of demurrer.)*

Wherefore they pray judgment of this court whether they shall be required to further answer said bill and move the court to dismiss said bill for want of equity.

II. And the said defendants, not waiving the foregoing demurrer, but wholly relying thereon, for a plea to said bill do aver and say that *(here set forth the grounds of plea)*.

All of which matters the said defendants do plead to said bill, and pray the judgment of this court whether they shall be compelled to further answer said bill, and move the court to dismiss said bill for want of equity.

III. And the said defendants, not waiving their said demurrer nor their plea, but relying thereon, for answer to said bill do say that *(here set forth in short and simple terms the defense to each claim asserted by the bill, omitting any mere statement of evidence and avoiding any general denial of the averments of the bill, but specifically admitting or denying or explaining the facts upon which the plaintiff relies, unless the defendant is without knowledge, in which case he must so state, such statement operating as a denial. Averments of the bill, other than of value or of amount of damage, if not denied by the answer, will be deemed confessed by the answer, except as against an infant, lunatic or other person non compos and not under guardianship. The answer must also state any counter-claim arising out of the subject-matter of the suit).*

Wherefore the defendant prays to be hence dismissed with costs, and that complainant's bill be dismissed for want of equity.

37. MOTION TO DISMISS THE BILL (EQUIVALENT TO DEMURRER).

(Title of court and of cause.)

And now come the defendants C. D. by E. F., their solicitors, and move the court to dismiss the bill for want of equity, and also because *(here state grounds of any special demurrer)*.

38. ORDER DENYING MOTION TO DISMISS.

(Title of court and of cause.)

This cause coming on to be heard upon the motion of C. D. by E. F. his solicitor, to dismiss the bill for want of equity;

now after argument and upon consideration said motion is denied, and said defendant is ruled to answer in five days.

39. ORDER SUSTAINING DEMURRER AND
DISMISSING BILL.

(Title of court and cause.)

This cause coming on now to be heard upon the demurrer of the defendant, C. D., filed herein, to the bill of complaint, after argument of counsel and due deliberation by the court,

It is ordered, adjudged, and decreed that the demurrer of the said defendant to the bill of complaint be, and it is hereby, sustained, on the ground that there is no equity in the said bill.

And the complainants electing to stand by their said bill of complaint, and moving that, if the court holds that there is no equity in the said bill, the court disposes of it, in order that they may, by appeal or writ of error, secure the review of the action of the court in so holding; and the court finding that there is no equity in the said bill:

It is therefore ordered, adjudged, and decreed that said bill of complaint be, and it is hereby, dismissed out of court for want of equity, and at complainant's costs, and that this decree be treated and regarded and stand in all respects as the final decree in this cause.

40. ORDER OVERRULING DEMURRER.

(Title of court and cause.)

This cause coming on to be heard upon the demurrer of the defendant, C. D., filed herein, to the bill of complaint, after argument of counsel and due deliberation by the court, said demurrer is overruled, and

It is ordered that the said defendant, C. D., answer the bill of complaint herein within ten days from this day.

41. PLEA.

(Title of court and of cause.)

The plea of C. D., defendant, to the bill of complaint of A. B., complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the complainant's said bill mentioned, to be true in such manner and form as the same are therein and thereby set forth and alleged, doth plead thereunto, and for pleas says, that, etc. *(Here set forth the subject-matter of the plea, and conclude as follows:)* All which matters and things this defendant avers to be true, and pleads the same to the whole of the said bill, and demands the judgment of this honorable court whether he ought to be compelled to

make any answer to the said bill of complaint; and prays to be hence dismissed with his reasonable costs in this behalf most wrongfully sustained.

By, Solicitor for Defendant.

(If the plea is of matters of fact, and not of jurisdiction, add affidavit.)

(*Note.*) *Signing of Plea.* A plea must be signed by the party, as well as counsel; but where it is not sworn to, the signature of counsel is sufficient.

When plea must be sworn to. A plea in bar of matters of fact must be sworn to; but pleas to the jurisdiction of the court or disability of the person of the complainant, or pleas in bar of any matter of record, or of matters recorded, as of a record in the court itself, or any other court, need not be on oath. (1 Barb. 117.)

In all cases except in federal practice, where a plea is accompanied by an answer, it must be put in upon oath. A plea must be verified by oath, although the complainant has expressly waived an answer from the defendant on oath. If it is not sworn to when oath is proper, the complainant may, if application is made in apt time, have it stricken from the files, but the application must be made before the argument of the plea.

42.

PLEA TO PART OF BILL.

(*Title of court, of cause, and address to judges.*)

The plea of C. D. and E. F., defendants, to part of said bill.

These defendants, not confessing all or any of the matters in said bill of complaint contained to be true as therein alleged, for plea to so much and such part of said bill as (*here describe part pleaded to*), aver and say that (*here set forth the matter of the plea*), all of which matters and things these defendants do aver to be true, and they plead the same to so much of said bill as is hereinbefore described, and pray the judgment of the court whether they shall be required to further answer so much of said bill as is covered by this plea.

I,, defendant in the above cause, being duly sworn, do say that I have read the foregoing plea to the bill of complaint and the matters therein stated are true in point of fact.

Subscribed and sworn to before
this day of, 191

43.

PLEA IN FEDERAL COURT.

(*Title of court, of cause, and address to judges.*)

The plea of C. D. and E. F. to the bill of complaint.

These defendants, not confessing all or any of the matters in said bill of complaint to be true as therein alleged, for plea to said bill aver and say (*here set forth the matter of the plea*).

All of which matters and things these defendants do aver to be true, and plead the same in bar (*or, in abatement, as the case may be*) of complainant's said bill, and pray the judgment of the court whether they shall be compelled to further answer said bill, and pray to be hence dismissed with costs.

.....
.....;

44.

PLEA OF FORMER ADJUDICATION.

(*Title of court and of cause.*)

The plea of, defendant, to the bill of complaint.

This defendant, for a plea to said bill, avers,

That after the matters and things alleged in complainant's bill, and before the commencement of this suit, to-wit, etc., in the Circuit Court of the county of, one E. F. filed his bill in chancery, against this defendant and one G. H., charging, etc. (*Here insert the subject-matter of the suit*), and such rights and interests therein, as he now claims by his present bill; and praying relief against this defendant in the same manner, and for the same matters, and to the same effect as the complainant now prays by his said present bill; and that this defendant and the said G. H. appeared and put in their answer to the said former bill, and the complainant replied thereto; and evidence being taken in said former suit relating to the matters in controversy, and the said cause coming on for hearing before said court, a final decree was, on, etc., rendered therein, in form and effect following. (*Here insert the findings and decree in former case*) and that the said former bill and the said several proceedings and final decree in the said former suit still remains determined and in full force and effect.

Wherefore, said defendant pleads said former adjudication to the whole of said bill, and demands the judgment of this court whether he should make any answer to said bill, and prays to be hence dismissed with his reasonable costs.

.....
By.....
Solicitor for defendant.

45. PLEA OF THE STATUTE OF LIMITATIONS.

(*Title of court and cause.*)

Defendant C. D. by M. F., his solicitor, for a plea to said bill, avers:

That if the complainant (either in his own right or as executor of E. F., deceased, in the bill named), ever had any cause of suit against him, this defendant, for or concerning any of the matters, transactions or dealings in the said bill of complaint mentioned, which this defendant doth in no sort admit, the same did accrue or arise above years before the said bill of complaint was exhibited in this honorable court; and this defendant further for plea says and doth aver, that he did not at any time within years before the filing of the complainant's said bill of complaint, ever promise or agree to come to any account for, or to pay, or any way satisfy the complainant any money, for or concerning any the matters, transactions or dealings in the complainant's said bill of complaint charged or alleged.

Wherefore, etc.

46. PLEA OF A RELEASE TO PART OF BILL, WITH ANSWER
IN SUPPORT OF THE SAME.
(ANOMALOUS PLEA.)

(*Title of court and cause.*)

That as to so much and such part of the complainant's bill as seeks an account of the several dealings and transactions between the complainant and this defendant, previously and up to the day of, etc., and prays the balance, if any, which shall be found due, upon taking such account, from this defendant, may be paid by him to the complainant; this defendant doth plead thereto, and for plea says, that previous to the filing of the complainant's bill, that is to say, on etc., the complainant, in consideration of the sum of dollars, then paid to him by this defendant, by a certain writing of release, under his hand, and sealed with his seal, ready to be produced to this honorable court, did for himself, his executors and administrators, remise, release, and forever quit-claim unto this defendant, his heirs, executors and administrators, among other things, the several matters and things in the complainant's bill mentioned and complained of, an account whereof is thereby sought against this defendant as aforesaid, and all suits and demands whatsoever, both at law and in equity, which the complainant thus had, or might thereafter have in respect of the several dealings and transactions, matters and things, in the said bill mentioned, or any of them; and this defendant avers, that the said release was freely, fairly and voluntarily given and executed by the complainant, on the day the same bears date; and that the complainant well knew the nature and effect thereof pre-

viously to giving and executing the same; and that the sum of _____ dollars so paid by this defendant to the complainant as aforesaid, was a full and fair equivalent for any demand which the complainant could or might have against this defendant in respect of the several matters therein, and in the said bill also, mentioned, or any of them.

Therefore, this defendadnt pleads the said release in bar to so much of the complainant's bill as is hereinbefore particularly mentioned, and prays the judgment of this honorable court, whether he ought to be compelled to make any further answer to so much of the said bill as is before pleaded unto.

And this defendant not waiving his said plea, but insisting thereon for further answer in support of his said plea, says he denies that the said release was unduly obtained by this defendant from the complainant, or that the complainant was ignorant of the nature and effect of such release, or that the consideration paid by this defendant to induce the complainant to execute the same, was inadequate to the just claims and demands of the complainant against this defendant, in respect to the several dealings and transactions in the said bill mentioned, or any of them; and this defendant denies, etc., etc. (*Here insert any other denial or allegation of fact that the case may require, and add affidavit of the truth of the plea and answer.*)

47. ORDER ALLOWING PLEA (UPON HEARING AS TO SUFFICIENCY OF PLEA).

(Title of court and cause.)

The plea of the defendant, C. D., to the whole (*or part*) of the complainant's bill in this cause, coming on to be argued, and the solicitors for the respective parties having been heard thereon, and the court, being fully advised in the premises, does hold the said plea to be good and sufficient, and

It is ordered that the said plea do stand and be allowed.

48. ORDER OVERRULING PLEA FOR INSUFFICIENCY.

(Title of court and cause.)

The plea of the defendant, C. D., to the bill of complaint in this cause, coming on to be argued before the court, and the solicitors for the respective parties having been heard thereupon, and the court, being fully advised in the premises, does hold the said plea to be insufficient, and therefore,

It is ordered that the same be overruled, and that the said defendant, C. D., answer the bill of complaint herein within days from this date.

49.

ANSWER.

(*Note.*)—An answer always begins with its title, specifying which of the defendants it is the answer, and the names of the complainants in the suit in which it is filed as an answer. It is irregular, and may be rejected, if it is not properly entitled, and does not show what bill it purports to answer.

50.

I. THE TITLE OF ANSWERS.

(Title of answer by one defendant.)

The answer of C. D., the defendant, to the bill of complaint of A. B., the complainant.

If the defendant was misnamed in the bill, he may in the body of his answer correct it thus: the answer of Walter Holden (*in the bill by mistake called Willie Holden*).

(Title of answer to amended bill.)

The answer of C. D., the defendant, to the amended bill of complaint of A. B., the complainant.

(Title of answer where exceptions have been taken to a former answer, and the bill has also been amended.)

The further answer of C. D., one of the defendants to the original bill, and his answer to the amended bill of complaint of A. B., the complainant.

(Title of amended answer.)

The amended answer of C. D., the defendant, to the bill of complaint of A. B., the complainant.

(Title of answer by infants by their guardian *ad litem*.)

The answer of C. D., an infant under the age of twenty-one years, by E. F., his guardian *ad litem*, to the bill of complaint of A. B., the complainant.

51.

II. THE COMMENCEMENT OF AN ANSWER.

(Introduction to an answer of one defendant.)

This defendant, now and at all times hereafter, saving to himself all manner of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in the said bill contained, for answer thereunto, or to such parts thereof as are material or necessary for him to make answer unto, says, etc.

52. III. ANSWERS AND DISCOVERY.

And this defendant, further answering, says that he has been informed and believes it to be true, that, etc.;

This defendant admits that, etc.;

or,

This defendant, further answering, denies, etc.;

or,

This defendant, further answering, says that he has no knowledge, information or belief, and therefore denies that, etc.

52A. IV. DEFENSES.

And this defendant avers that (*here state any affirmative defenses*).

53. V. CONCLUSION OF ANSWER.

And this defendant denies all other matters, causes or things in the complainant's said bill of complaint contained, material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied; all which matters and things this defendant is ready and willing to aver, maintain and prove, as this honorable court shall direct.

And this defendant, further answering, denies that the complainant is entitled to the relief, or any part thereof, in the said bill of complaint demanded, and prays the same advantage of this answer as if he had pleaded or demurred to the said bill of complaint; and prays to be dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

C. D.

.....,
Solicitor for Defendant.

(If answer is required to be under oath, the following affidavit should be attached:)

54. AFFIDAVIT TO ANSWER.

State of }
County of } ss.

C. D. being first duly sworn, deposes and says that he has read (*or heard read*) the above answer, subscribed by him, and knows the contents thereof, and that the same is true, of his own knowledge, except as to matters which are therein stated to be on his information and belief, and as to those matters, he believes them to be true.

(*Jurat.*)

.....

The answer must be signed by the defendant putting it in, unless leave has been obtained to file an answer not signed, because originally the answer was always under oath and was testimony in the cause. (*Dennison v. Bassford*, 7 Paige 370.) The answer must also be signed by counsel. (2 Dan. 268.) Counsel must individually sign their own names (U. S. Eq., Rule 24).

The signing of the answer by the defendant may be waived by the complainant, and if an unsigned answer is put in and the complainant files a replication, that step on his part will be held to be such a waiver. (*Fulton Bank v. Beach*, 2 Paige 307.) The court, under special circumstances will permit the defendant to file an answer not signed by him as when he resides at a distance, or has gone abroad before an answer could be prepared or the like. (*Dumond v. Magee*, 2 Johns. Ch. 240.) The answer of a corporation is put in under the corporate seal and not under oath. If it is put in not under seal it will be taken from the files as irregular. (*Ranson v. Stonington Sav. Bk.*, 2 Beasley, 13 N. J. Eq. 212; *Supervisors v. Miss. & W. R. Co.*, 21 Ill. 338.) But unless the answer of the corporation is sworn to it cannot be made the basis of a motion to dissolve a temporary injunction: an injunction will not be dissolved upon the filing of an answer not on oath denying the equities of the Bill. (*Fulton Bk. v. New York, etc.*, 1 Paige 311.)

Therefore, if an injunction bill waives an answer under oath, the defendant may still put in an answer under oath and so treat it, for the purpose of moving to dissolve the injunction granted on the bill. (*Doughrey v. Topping*, 4 Paige 94.)

If the answer must be sworn to it should be done before the proper officer. Who is such proper officer depends upon the provisions of the local statute and the rules of the court. (U. S. Eq., Rule 36.)

55. SHORT ANSWER TO BILL (FEDERAL COURT).

(Title of court, of cause, and address to Judges.)

The answer of C. D. and E. F., defendants to the bill of complaint.

These defendants, saving and reserving unto themselves the benefit of all exceptions to the errors and imperfections in said bill contained, for answer to so much thereof as they are advised it is necessary or material for them to answer unto, do aver and say that (*here insert the matters responsive to the bill, as well as the matters of defense*).

And having thus fully made answer to said bill, these defendants pray to be hence dismissed with costs.

.....

56. ANSWER OF INFANTS BY THEIR GUARDIAN
AD LITEM.

The answer of E. D. and C. D., infants, under the age of years, by E. F., their guardian *ad litem*, to the bill of complaint of A. B., the complainant.

These defendants answering by their guardian *ad litem*, say, that they are infants, and they therefore submit their rights and interests in the matter in question in this cause, to the tender consideration and protection of this honorable court, and pray strict proof of the matters alleged in said bill of complaint.

E. D.

C. D.

By E. F., their guardian, *ad litem*.

57. ANSWER SETTING UP DEFENSE OF STATUTE
OF LIMITATIONS.

And these defendants, in addition to the foregoing answer, aver that the cause of action, if any there may be, arising to the complainants on account, or by reason of the several allegations and complainants in their said bill contained, did not accrue within years before the said bill was filed; and this allegation the defendants make in bar of the said complainants' bill, and pray that they may have the same benefit therefrom as if they had formally pleaded the same.

58. STATEMENT IN ANSWER, CLAIMING THE BENEFIT
OF THE STATUTE OF FRAUDS.

(*After that part of the answer which shows the facts, which make the statute of frauds apply:*)

And this defendant says, that by the statute of, it is among other things provided, that no action shall be brought whereby to charge any person upon any contract of any lands, tenements and hereditaments, or any interest in or concerning them unless the agreement upon which such action should be brought, or some memorandum or note in writing shall be signed, by the said party to be charged therewith, or some other person by him lawfully authorized (give the language of the statute); and this defendant insists upon the said statute, and claims the same benefit as if he had pleaded the same.

58A. SHORT DEMURRER, PLEA, AND ANSWER IN THE
FEDERAL COURTS.

(*Title of court and of cause.*)

The answer of defendant C. D. to the bill of A. B.

C. D. answering, moves and prays the court to dismiss the bill for want of equity, and also because (*here state grounds for special demurrer to bill*).

And said defendant further answering, for a plea to said bill, avers and says (*state matter of plea*). And defendant therefore again moves and prays the court to dismiss said bill for want of equity.

And said defendant now still insisting upon the demurrer and plea aforesaid, further answering, says: (*here set forth answers as directed in form No. 36 ante*).

59. CONCLUSION OF AN ANSWER INSISTING THAT THE
COMPLAINANT HAS AN ADEQUATE
REMEDY AT LAW.

And this defendant submits to this honorable court that all the matters in the complainant's bill mentioned and complained of, are matters which may be tried and determined at law, and with respect to which the complainant is not entitled to any relief from a court of equity; and this defendant asks that he shall have the same benefit of this defense as if he had demurred to the complainant's bill; and this defendant denies, etc.

60. DISCLAIMER.

(*Title of court and cause.*)

The disclaimer of C. D., one of the defendants, to the bill of complaint of A. B., the complainant.

This defendant, saving and reserving to himself, now and at all times hereafter, all manner of advantage and benefit of exceptions and otherwise that can be or may be had and taken to the many untruths, uncertainties and imperfections in the said complainant's bill of complaint contained, for answer thereunto, or unto so much, or such part thereof as is material for this defendant to make answer unto, says, that he fully and absolutely disclaims all manner of right, title and interest whatsoever in and to the (here describe the property in dispute) in said bill mentioned, and in and to every part thereof.

And this defendant denies all other matters, causes and things in the complainant's said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied; all which matters and things this defendant is ready and willing to aver, maintain and prove, as this honorable court shall direct.

And this defendant, further answering, denies that the complainant is entitled, as against this defendant, to the relief, or any part thereof, in the said bill of complaint demanded, and prays the same advantage of this answer as if he had pleaded or demurred to the said bill of complaint; and prays to be dismissed

with his reasonable costs and charges in this behalf most wrongfully sustained.

C. D.

.....,

Solicitor for Defendant.

(Add affidavit, if required, as in answer.)

61.

EXCEPTIONS FOR INSUFFICIENCY.

(*Title of court and cause.*)

Exceptions taken by the said complainant to the answer put in by the defendant, C. D., to the said complainant's bill of complaint:

First exception: For that the said defendant, C. D., has not, to the best and utmost of his knowledge, remembrance, information, and belief, answered and set forth whether (set forth the interrogatory or the allegation of fact, in the bill which is not answered, *in hanc verba*).

Second exception: For that the said defendant, C. D., has not in manner aforesaid answered and set forth whether, etc. (set forth the allegation or interrogatory not properly answered).

In all which particulars, the answer of the said defendant, C. D., is, as the said complainant is advised, imperfect, insufficient, and evasive, and the said complainant therefore excepts thereto, and prays that the said defendant, C. D., may put in a further and better answer to the said bill of complaint.

J. D.,

Solicitor for Complainant.

62.

EXCEPTIONS FOR SCANDAL AND IMPERTINENCE.

(*Title of court and cause.*)

Exceptions taken by the complainant to the answer of the defendant, C. D., to the bill of complaint in this cause, for scandal and impertinence:

First exception: For that the said answer is scandalous from and including the word "they," in the third line of the second page, down to and including the word "appear," in the eleventh line of the third page thereof.

Second exception: For that the said answer is impertinent from and including, etc. (as before).

In all which particulars this complainant excepts to the said answer put in by the said defendant, C. D., to the said bill of complaint, as scandalous or impertinent, and he humbly insists that the same ought to be expunged from the said answer.

.....

Solicitor for Complainant.

63. ORDER OF REFERENCE ON EXCEPTIONS.

(Title of court and cause.)

Exceptions for insufficiency (or impertinence or scandal) having been filed to the answer of the said defendant, C. D., and the said defendant not having submitted to any of the said exceptions, on motion of, solicitor for complainant.

It is ordered that it be referred to G. F., one of the masters in chancery of this court, to look into the bill of complaint, the answer of the said defendant, and such exceptions, and to report whether such exceptions are well taken or not.

64. REPORT UPON EXCEPTIONS.

(Title of court and cause.)

To the Honorable Judges of said court, in Chancery Sitting:

In pursuance of an order of this court, made in the above-entitled cause on the day of, A. D. 1902, whereby it was referred to the undersigned, one of the masters in chancery of this court, to look into the complainant's bill of complaint, the answer of the said defendant, C. D., and the exceptions taken to said answer by said complainant, and report whether said exceptions are well taken or not:

I, the said master, do hereby respectfully certify and report that, having been attended by the counsel for the respective parties, and having looked into such bill and answer and the exceptions taken thereto, and having duly considered the same, I find that the second and fourth exceptions to said answer are well taken, and that the first, third, and fifth exceptions are not well taken.

All of which is respectfully submitted.

....

G. F.,
Master in Chancery.

Dated, 1902.

64A. MOTION TO STRIKE OUT FOR INSUFFICIENCY.

(IN THE FEDERAL COURTS.)

(Title of court and of cause.)

And now comes A. B. by E. F., his solicitor, and moves and prays the court to strike out of the answer for insufficiency, the following:

Beginning with the word on the second line of page 3 of said answer, strike out all matter to and including the word on line 4 of page 7 of said answer, because said matter is wholly insufficient to constitute any affirmative defense (or set-off or counter claim) as against the claims of this plaintiff, for the reason that (*here state the nature of the defects or omissions in the part of the answer to be stricken*).

And said A. B. further moves and prays the court to strike out for insufficiency the following:

Beginning with the word, etc.

65. ORDER FOR FURTHER ANSWER, ON MASTER'S REPORT.

(Title of court and cause.)

The answer of the defendant, C. D., having been reported insufficient in the matters of the second and fourth exceptions taken thereto, by G. F., the master to whom the exceptions of the complainant to such answer were referred, and the exceptions of the said defendant, C. D., to said master's report having come on to be heard, and, after due consideration by the court, having been overruled, on motion of J. E., solicitor for the complainant,

It is ordered that the said defendant, C. D., put in a further answer to the matters of the said second and fourth exceptions within ten days from the entry of this order.

66. GENERAL REPLICATION.

(Title of court and cause.)

The replication of A. B., complainant, to the answer (*or*, plea) of C. D., defendant.

This repliant, saving and reserving unto himself all and any manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto, says: That he will aver and prove his said bill to be true, certain and sufficient in law to be answered unto; and that the said answer of the defendant is uncertain, untrue and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in law to be replied unto, confessed and avoided, traversed or denied, is true, all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

.....,
Solicitor for Complainant.

The replication may be signed by either the complainant or the solicitor (1 Barb. 250).

67. NOTICE OF MOTION WITH PROOF OR ADMISSION
OF SERVICE.

(Title of court and cause.)

To, solicitor for said defendant,

You are hereby notified that on, the, day of, A. D., at .. o'clock, or as soon thereafter

as counsel can be heard, we shall, before his honor, Judge, in the room occupied by him as a court room in the building, move that (*specify the object of the motion*), and for such other order or relief as the court may think proper to grant (which motion will be founded on affidavits, with copies of which you are herewith served and on the bill and answer filed in this cause), at which time and place you may appear if you see fit.

Dated,, A. D. 19...

Yours, etc.,

.....,
Solicitors for Complainant.

State of, }
County of } ss.

....., being first duly sworn, deposes and says that he served the within notice (and affidavits therein referred to), on, defendant in the above-entitled cause, by leaving true copies of the same with him (*or upon*, defendant in the above-entitled cause, by leaving true copies of the same with, his solicitor; or upon, defendant in the above-entitled cause, by leaving true copies of the same with, a person in charge of the office of, the solicitor for the said, in the absence of the said, from said office) on the day of, A. D. 19., at the hour of And further affiant saith not.

G. H.

Subscribed and sworn to before me this

..... day of, A. D. 19..

.....

Notary Public.

If the party upon whom notice is served admits receipt of a copy, the affidavit may be dispensed with, and the following form used:

Received a copy of the within notice (and affidavits therein referred to) this day of, A. D. 19...

.....,
Solicitor for Defendant,

If service of the notice is accepted, the following form may be used:

Due and sufficient service of the within notice and affidavits therein referred to is accepted this day of, A. D. 19..

C. D., Defendant,
By L. M., His Solicitor.

68. AFFIDAVIT ACCOMPANYING MOTION.

State of, }
 County of } ss.
 In the Court of, Term, A. D.
,
 Complainant, }
 v. } Gen. No.
, } Term No.
 Defendant. }

AFFIDAVIT OF N. O. P.

N. O. P., being first duly sworn, on oath deposes and says that (*here state the facts which are to be set up by the affidavit*).
 And further deponent saith not.

Subscribed and sworn to before me this
 day of, A. D.

 Notary Public.

(Notarial Seal.)

69. PETITION FOR PRODUCTION AND INSPECTION OF PAPERS.

(*Title of court and cause.*)

(*Address to the court.*)

The petition of the above complainant respectfully shows that the answer of the defendant C. D. has been put in in this cause, and a replication thereto has been filed, but that no testimony has been taken in the cause, nor has the same been noticed for hearing; that by the answer of the said defendant he admits that he is in possession of divers books, (*or deeds, letters, accounts, and other papers*) relating to the matters at issue in this cause described as follows: (*description*); that your petitioner has a direct and immediate interest in the said books, (*deeds, and other papers*), as follows: (*describe interest in books or papers*), and an inspection thereof is necessary to enable him to examine witnesses in this cause, and to prepare such cause for hearing.

Your petitioner therefore prays that the said defendant may be ordered to produce to and leave with the clerk of this court the books, (*deeds, and other papers*) above mentioned, and that your petitioner, his solicitor, agent, or counsel, may be at liberty to inspect and peruse the same, and to take copies thereof or extracts therefrom, as he may be advised.

.....
 Petitioner.

I,, the said petitioner, depose and say that I have read the foregoing petition by me subscribed and the same is true in substance and in fact.

Subscribed and sworn to before me this,
 day of, A. D. 19....

.....
 Notary Public.

70. ORDER FOR PRODUCTION BY DEFENDANT.

(Title of court and cause.)

On reading and filing the petition of the complainant in this cause, duly verified (and on reading and filing due proof of the service of notice of this motion), and on motion of, solicitor for said complainant, in support of the same, and on hearing in opposition thereto (*or*, no one appearing to oppose),

It is ordered that the defendant,, do, within days from the date of this order, produce before and leave with the clerk or of this court the books, deeds, letters, accounts, and other papers relating to the matters at issue in this cause, which are admitted by the said defendant's answer to be in his possession, and that the complainant, his solicitor, agent, or counsel, may be at liberty to inspect and peruse the same, and to take copies thereof or extracts therefrom, as he may be advised, at his own expense, but that the said defendant be at liberty to seal up such parts of the said books, deeds, etc., as he shall make oath do not in any manner relate to the matters in controversy in this suit.

71. ORDER FOR PRODUCTION OF PAPERS BY COMPLAINANT.

(Title of court and cause.)

On reading and filing the petition of the defendant,, duly verified, praying for the production and inspection of the certain promissory note therein mentioned before he shall be compelled to answer the bill in this cause, and on hearing in support of such petition, and in opposition thereto,

It is ordered that the complainant do, within days, leave with the clerk of this court the certain promissory note or instrument in writing mentioned in his bill to bear date the day of, A. D., and alleged therein to have been given by to, for assuring the payment of the sum of dollars, days after such date, and that the said defendant have days' time to answer said bill after the said note or instrument shall have been so produced.

72. PETITION FOR LEAVE TO AMEND.

(Title of court and cause, and address to the court.)

The petition of the above-named complainant respectfully shows that the defendant in this cause has caused his appearance to be entered therein, and has put in his answer to the bill of complaint, and that your petitioner has filed a replication, but no witnesses have been examined by either party; that since the filing of said replication your petitioner has been advised by his counsel, and believes, that it is essential to the rights of your petitioner in this cause that the bill herein should be amended by adding thereto the following statements: *(Insert matter proposed to be introduced.)*

And your petitioner further shows that he had no knowledge of the facts above stated, nor was he aware of the necessity of inserting them in his bill, until after the said replication was filed.

Your petitioner therefore prays that he may be at liberty to withdraw his said replication and amend his bill by adding parties defendant or otherwise, as he shall be advised, on payment of costs.

.....
Petitioner.

73. PETITION TO AMEND BILL BY ADDING A DEFENDANT.

(Title of court and cause, and address to the court.)

The petition of the above-named complainant respectfully shows that your petitioner filed his bill in this honorable court, against the defendant, on the day of, A. D., to which the defendant has appeared and put in his answer, upon which your petitioner is advised to make a party to this cause, and to bring him before the court as a defendant to the suit.

Your petitioner therefore prays that he may have leave to amend his bill by adding the said as a defendant thereto, with apt words to charge him.

.....
Petitioner.

74. AMENDMENTS TO BILL.

(Title of court and cause.)

Amendments to the bill of complaint in the above-entitled cause, made pursuant to an order of court dated the day of, A. D.

First. In the third line of the second page of the bill, after the word "testator," interline "to-wit, on or about the 5th day of June, 1902."

Second. After the word "satisfaction" in the tenth line of the fourth page, strike out the words (*here insert the words to be stricken out*), and in lieu thereof insert the following: (*Here insert the words to be inserted.*)

Third. Strike the names of and out of the seventh line of the fourth page.

C. D.,
Complainant.

E. F.,
Solicitor for Complainant.
(Add verification if necessary.)

75. ORDER GRANTING LEAVE TO FILE AMEND- MENT TO BILL.

(*Title of court and cause.*)

This cause coming on this day to be heard on the verified petition of, complainant in the above-entitled cause, praying that leave be granted to amend the bill of complaint in the above-entitled cause, as specifically set forth in said petition, and the defendant being present in open court by, his solicitor, and the court being fully advised in the premises,

It is ordered by the court that leave be, and the same is hereby, given to said complainant to amend his bill of complaint in the above-entitled cause by filing a copy of said proposed amendments attached to said petition for such leave.

76. ORDER OF REFERENCE TO TAKE PROOFS AND TO REPORT SAME TOGETHER WITH CONCLU- SIONS OF FACT AND OF LAW THEREON.

(*Title of court and cause.*)

This cause coming on to be heard upon motion of, solicitor for; upon consideration thereof,

It is ordered that this cause be and hereby stands referred to a master in chancery of this court, to take the evidence according to law and to report the evidence to this court, together with his conclusions of fact and of law thereupon, with all reasonable speed; to examine the questions in issue in this cause and report his conclusions thereon; to report his conclusions as to whether the evidence and pleadings entitle the complainant or other parties to the relief or any part thereof prayed for in their respective pleadings, or to any other relief; and to perform all such other lawful services as may be necessary or proper under the premises. And for the better taking of the evidence all parties not in default shall introduce their evidence before said master with all reasonable speed, and shall produce before him all books and writings in their possession or

power which contain evidence pertinent to the issues and matters in reference; and said master is hereby authorized and directed to cause to come and be produced before him according to law, all proper witnesses and books and writings requested by the parties.

Dated this day of 19...

.....
....., Judge.

77. ORDER OF REFERENCE TO STATE ACCOUNT.

(Title of cause and of court.)

This cause coming on for further hearing upon the bill of complaint, the answer of the defendant to said bill, the replication of the complainant thereto, and the testimony taken and reported by the master in chancery under a former order of the court, and the court having heard the arguments of counsel for the respective parties, and being fully advised in the premises, doth find, etc. (*here insert the findings of the court as to the facts and the rights of the parties and the rule adopted in stating the account*). And in further consideration of the premises, it is ordered that this cause be again referred to the master in chancery of this court, to take the books of account and all papers referred to in the pleadings and report herein heretofore filed, and state the accounts between said parties, taking and reporting such evidence, if any, as may be further offered by either of the parties to this suit, outside of the said books of account, documents, etc., and report the said evidence and statement of account to the court as soon as practicable, together with his conclusions of fact and of law thereon. And for the better taking of such evidence and stating such account, the master shall cause such witnesses as the parties may desire to appear and give evidence before him, and shall cause the parties, or either of them, to produce before him upon oath, all such deeds, books, papers and writings in their possession or power, containing evidence pertinent to the issues and matters in reference, as may be proper and as may be desired by the parties; and said witnesses are to be examined upon oral or written interrogatories as the master shall direct.

Dated this day of 19...

....., Judge.

78. ORDER OF REFERENCE AS TO ALIMONY.

(Title of court and cause.)

It is ordered that the said defendant pay to the said complainant, or her solicitor, the sum of \$100, in and towards defraying the costs and expenses of this suit, and that execution may issue therefor.

It is further ordered that this cause be referred to, one of the masters in chancery of this court, to take evidence and report his conclusion as to what would be a reasonable sum to be allowed for the support of the said complainant during this suit, and also for the support during this suit, of the children of the marriage now in her custody and charge.

It is further ordered that said master report his recommendation as to the times and manner in which the said sums should be paid to the complainant.

Dated this day of, 19 ..

....., Judge.

79. MASTER'S NOTICE OF DAY FOR EVIDENCE.

To

Please take notice, that by virtue of an order of reference entered in the above entitled cause, on the day of, 19.., I will, at ten o'clock in the morning, on the day of 19.., at my office, room, street, in, in said county, fix a day to proceed with the taking of testimony or evidence on such reference; and on the day so fixed I shall proceed with the taking of such testimony or evidence.

....., the day of, 19..

(Signed)

"Master in Chancery of the Court of County,"

80. MASTER'S SUBPENA DUCES TECUM.

State of, }
County of } ss.

In the name of the people of the state of

To

You are hereby commanded to appear before me, at my office, No. street, in the city of, said county, on the day of A. D. 19.., at o'clock .. M., then and there to testify the truth in a suit wherein, complainant, and, defendant, and bring with you and then and there produce a certain (*book or writing, give description of same*) and all other books or writings which contain evidence pertinent to the issues in said cause; and this you shall in no wise omit, under the penalty of the law.

Given under my hand and seal, this day of, A. D. 19..

.....
Master in Chancery of the Court of County.

81. AFFIDAVIT OF SERVICE OF WRIT.

State of, }
County of } ss.

....., being duly sworn, on oath, says that he served the within writ by reading the same to and leaving a copy thereof with being the within named, on the day of, 19.., in said
.....

Sworn to before me this.....
day of, 19....
(Seal)

Fees:
Mileage \$
Service \$
Total \$

Note: For a witness subpoena, omit the part referring to bringing books and papers.

82. MASTER'S REPORT OF EVIDENCE AND CONCLUSIONS OF FACT AND LAW THEREON.

(*Title of court and cause, and address to the court.*)
Report of, Master in Chancery.

Pursuant to an order of reference heretofore entered herein, I, the said master, do certify and report as follows:

That upon due notice to all the parties hereto, and in due form of law, and having caused to come before me and be produced all such witnesses and books and writings as the respective parties desired and made known to me; witnesses were duly sworn and testified, evidence was heard and received, and proceedings were had as more fully appears from the record and transcript of proceedings and evidence annexed as a part of this report, which said record and transcript, together with the exhibits therein mentioned, (and together with such depositions, affidavits and other documents as were lawfully filed in said cause and were produced before me as evidence), contains all the evidence submitted before said master, in said cause. And from the competent evidence so submitted and from the confessions and admissions expressed and implied in and by the pleadings in said cause, said master finds the following matters of fact to be true: (*Here set forth the conclusions of fact found by the master.*)

Upon the facts aforesaid, and from the pleadings filed in said cause, the said master finds the following conclusions of

law: (*Here set forth the conclusions of law found by the master.*)

Said master therefore, upon the findings of fact and of law aforesaid, concludes that the equities of this cause are with the complainant, and that he is entitled to the relief prayed for in his bill, except as otherwise found herein.

All of which is respectfully submitted.

Dated this day of, A. D. 19..

Master in Chancery of the Court of County,
.....

(Then annexed to the report follows the report, record and transcript of evidence.)

83. MASTER'S REPORT OF EVIDENCE.

State of }
County of } ss.

In the Court. In Chancery.

Adams et al. }
v. } Gen. No. 12,860.
Brown et al. }

Report, record, and certificate of proceedings and evidence in the above entitled cause had and taken before, master in chancery of said court in his office, suite, street,, on, 19.., at o'clock, pursuant to an order of reference heretofore entered:

Present, Esq., representing the complainant;, Esq., representing

Mr.: "I now file with the master a copy of the notice for this hearing showing signed receipt of notice by and proving by affidavit delivery of notice to I also file with the master, the master's writ of subpœna with the endorsement showing lawful service of same on and to testify at this meeting."

Master: Let them be stamped and placed on file.

Whereupon Mr. called as a witness, who after being duly sworn by the master, testified as follows:

Mr.: State your name, residence and occupation.
A.—John Armstrong, 753 West Monroe St., Chicago, shoe merchant, etc., etc. (*Here follows the testimony in the form of question and answer.*)

Whereupon:

Mr. H. W. Rice, of Rice and Carter:

If you are through with the direct examination, I will ask Mr. Armstrong a few questions upon cross-examination:

Q.—Mr. Armstrong, please state who was present when the

contract marked exhibit "D," which I hand you, was signed?
A.—Mr. Carter, Mr. Brown and myself.

Etc., etc. (Here follows cross-examination, and then follows the re-direct examination.)

(Signed) JOHN ARMSTRONG.

Subscribed and sworn to before me this 20th day of June, 1905.

.....

Master in Chancery of the Court of County,
.....

(Seal)

Whereupon Mr. called as a witness, who, after being duly sworn by the master, testified as follows:

Mr.: State your name, residence and occupation.

Etc., etc.

(Signed and sworn to as above.)

84. MASTER'S CERTIFICATE OF EVIDENCE. AT THE END OF HIS REPORT OF EVIDENCE.

I,, master in chancery of the court of county,, do hereby certify that each of the witnesses aforesaid, before testifying, was by me first duly sworn or affirmed according to law, to testify and speak the truth, the whole truth, and nothing but the truth, in relation to the matters in reference and in answering all questions put to them; that the testimony of each of them was reduced to writing, and, after being read over by each of them, the same was duly subscribed and sworn to or affirmed by each of said witnesses, as shown by the several jurats thereto attached; and, where no such signatures and jurats or affirmations appear, the signatures and jurats or affirmations thereto were waived by all the parties.

And I further certify that the foregoing record and transcript of the evidence of said witnesses, together with the exhibits hereinbefore referred to and attached, is a full, complete and true transcript of all the proceedings and evidence taken before me in said cause.

Dated this day of, A. D. 19..

.....

Master in Chancery of the Court of County,
State of

85. MASTER'S CERTIFICATE OF FEES.

State of }
 County of } ss.
 In the Court. In Chancery.
 Gen. No.
 }
 v. }
 }

MASTER'S CERTIFICATE OF SERVICES, FEES AND CHARGES

I hereby certify that I performed the following items of services and necessarily made the following expenditures under the special order of reference heretofore entered in the above entitled cause, and that such services necessarily consumed the following amounts of my time:

FEES FIXED BY STATUTE.

I have taken and reported folios of 100 words each, at 15 cents, \$.....

I hereby certify that a stenographer was necessarily employed and that said stenographer reported folios of 100 words each \$.....

FEES TO BE ALLOWED BY COURT.

(1) Time spent by master in hearing and granting motions for continuance by complainant, hours' time at \$ per hour, \$.....
, \$.....

(2) Time spent days, at \$..... per day, hours, at \$..... per hour, in hearing arguments, by complainant, \$.....

(3) After the report was made, time spent days, at \$..... per day, hours, at \$..... per hour, in hearing and considering objections by defendant to the report herein, \$.....

(4) Time spent days, at \$..... per day, hours, at \$..... per hour, in reading briefs and authorities presented, in determining and formulating findings of fact, and in determining and formulating conclusions of law, and in drafting the report herein,

I respectfully ask the court to allow, tax and fix the above charges, or such other amounts as to the court may seem proper.

Dated, this day of, 191....

Master in Chancery of the Court of County,

The above charges and amounts are hereby allowed, taxed and fixed as costs, as and for the master's fees and charges under the order of reference herein.

.....
Judge.

86. ORDER DIRECTING MASTER'S FEE TO BE PAID.

(Title of court and cause.)

And now comes, the master to whom this cause stands referred,, and it appearing to the court that due notice has been given to the solicitors of complainant and defendant herein, on motion of said master.

It is hereby ordered, adjudged and decreed that complainant A. and defendant B. are each primarily liable to advance and pay to said master one-half of his fees and charges, totaling to \$., heretofore allowed and taxed, and said complainant and said defendant are hereby ordered to pay to said master within five days the sums primarily due from them to said master as aforesaid, and this without prejudice to the final awarding of costs herein. If either of said parties fails to pay his respective share according to this order within five days, the other party may advance the defaulting party's share; whereupon, and in case both parties default in respect to this order, the court will enter such further order and decree as may be just and proper under the circumstances.

Dated this day of, 19..

.....
Judge.

87. PLAN OF MASTER'S FORECLOSURE REPORT.

1. Examine pleadings to see if bill is traversed.
2. Examine summons and returns therein for parties actually subject to the court's jurisdiction for correct caption of report.
3. Study testimony and examine exhibits.
4. Dietate report—finding as facts only things proved by *testimony or exhibits*; facts not proved before master but confessed by default, can be included in "i" herein.
 - (a) Find facts as to note and interest notes as alleged in bill; if bill is slovenly drawn, find facts from original note.
 - (b) Find facts as to execution, delivery, acknowledgment and recording of trust deed, as alleged in bill; if bill is slovenly drawn, from original trust deed or mortgage.
 - (c) Find facts as to provisions of trust deed, either as alleged in bill, or *quote* from the trust deed. If quoted, preface the following form:

That said trust deed among other things contains the following words, figures and provisions:

"

"

"

Always state provision as to release and waiver of homestead; the bill often omits this. The provisions of the trust deed cited should cite from the T. D., also the covenants, if any are broken, penalties, if any are incurred, other rights, if any are violated, solicitor's fees, etc, and the defeasance clause.

Note: In most states a properly acknowledged conveyance like a trust deed or mortgage or certified copy thereof, is, without further proof of execution, *prima facie* evidence, and, of itself, proves all facts under a, b and c, above. (Ill. Stat. Conveyances, Sec. 20). It can be overcome upon proof sufficient to destroy this *prima facie proof*. (Wolcott v. Lake View B. & L., 59 Ill. App. 415.)

(d) Find facts as to who is the legal owner of the principal and interest notes at time when bill was filed and up to time of report.

NOTE: Possession of note and mortgage is strong presumptive evidence of ownership.

(e) Find facts as to payments by defendant. Note and mortgage are *prima facie* evidence of amount due.

(f) Find facts as to defaults by defendant in failing to comply with provisions of trust deed.

(g) Find facts as to expenditures by complainant, for taxes, insurance, etc., etc., on account of defaults therein by defendant, and find as to "cash advanced for abstract continuation in order to properly begin this suit," and whether justified by the provisions of the trust deed.

(h) "That there is due from said..... to said..... on account of the provisions of said notes and trust deed and on account of the foregoing, the sum of \$......as appears from the following items:

(Make tabular statement of amounts due.)

Principal note No. 1 due Aug. 1, 1908	\$.....
Interest thereon at .....per cent.	
from..... to.....	.....
Interest note due Feb. 1, 1908.	.....
Interest thereon at.....per cent.	
from..... to.....	.....
Interest note due Aug. 1, 1907.	.....
Interest thereon at.....per cent.	
from..... to.....	.....

Jan. 7, 1908, cash advanced for taxes 1906	.....
Interest thereon at..... per cent. from Jan. 7, 1908, to.....	.....
Feb. 10, 1908, cash advanced for insurance,	.....
Interest thereon at..... per cent. from Feb. 10, 1898, to.....	.....
Mar. 7, 1908, cash advanced for continuance of abstr. of title	.....
Interest thereon at..... per cent. from Mar. 7, 1908, to.....	.....

Total. \$	.....

(NOTE: Some statutes require interest to be calculated according to the "six per cent method," a month being one-twelfth of a year and a day one-thirtieth of a month. Ill Stat. "Interest.")

"Also the further sum of \$.....incurred by said..... as his solicitors' fees herein, which sum last aforesaid is the sum expressly provided for in said trust deed, and said master finds the same to be a just and customary fee for the services rendered by complainant's solicitor herein; (or, if the trust deed provides for a 'reasonable' fee, 'which sum said master finds from the evidence to be a reasonable charge for the services performed by the complainant's solicitor')."

(i) Said master further finds and concludes that in law and in fact said complainant,.....has a lien on the premises aforesaid for the amounts found to be due him as aforesaid; that each and every material allegation in complainant's bill, except as otherwise found in this report, is admitted by the pleadings to be true (or) is by default taken and confessed as true herein; that the equities in this cause are with said complainant,....., and that he is entitled to the relief prayed for in his said bill so far as the same is consistent with this report.

Said master therefore recommends that the usual and regular decree of foreclosure and sale be entered herein in accordance with this report.

Dated this.....day of....., 19.....

Master in Chancery of the.....Court of.....County,
.....

88. PLAN OF MASTER'S REPORT OF BUILDING AND
LOAN ASSOCIATION FORECLOSURE.

Note carefully if evidence supports following findings:

Finding that.....Association is a corporation organized and doing business under the law of, that C. D. being a member of said association and the holder and owner of shares of the capital stock of said association, made, executed and delivered his certain.....bond (or agreement) in "words and figures as follows": (*quote bond in full*) and also executed and delivered the certain trust deed mentioned in said bond at the time and in the manner as set forth in complainant's bill.

Finding as to acknowledgment and recording of trust deed.

That the trust deed, mentioned in said bond, among other things contains the following words and figures: (*quote covenants, penalties and rights in question, also defeasance clause, release and waiver of homestead clause, solicitor's fee clause, other expenses clause, etc.*)

That....., at the time of filing the bill herein and up to this day was and is the legal holder and owner of said bond.

That said C. D. made the payments mentioned in said bond until the.....day of.....19 ; that the amount of dues paid on his shares of stock is \$; that said C. D. made default in the payment of the certain installment of dues, interest and premium aforesaid, which became due on the.....day of.....and in said default continues to this day.

That on the.....day of.....said association through its board or directors duly passed a resolution in words and figures as follows:

(*"Quote resolution declaring default and amount due, forfeiture of stock, and authorizing suit.*)

That between (*give date*) the last day C. D. paid money as aforesaid and (*give date of resolution*) (*give number*) installments of premium and of interest became due to said association from C. D.

Find facts as to defaults in the payment of taxes, and amounts, with dates, paid therefor by complainant association.

Find facts as to defaults in the payment of insurance and the amounts, with dates, paid therefor by complainant association.

If T. D. provides for specific recovery of money laid out for abstract of title, find that a continuation of abstract of title was necessary for purposes of this suit and the amount, with date, expended for abstract continuation.

That the following are the by-laws of said association which determine and govern the withdrawal value of the shares of stock aforesaid: (*quote by-laws.*)

That the withdrawal value of the stock aforesaid is \$.....

being \$amount paid as dues and.....per cent. interest thereon according to said by-laws.

That the following words and figures of the by-laws of said association determine and govern the assessment and collection of fines upon the capital stock of members of said association: (*quote by-laws on fines, if fines involved in cause.*)

That fines amounting to \$ were duly and regularly assessed against said.....according to said by-laws.

That on the day of being the day when by the resolution aforesaid the stock aforesaid owned by said was forfeited and reverted to said association, the membership of said C. D. ceased, and a legal relation of borrower and mortgage creditor superseded the contract relation set forth in the bond and trust deed aforesaid, and on said last mentioned day therefore the installments of interest and premiums falling due (*quarterly or semi-annually, as provided in T. D.*) mentioned in said bond and trust deed, ceased to fall due as before (*because of said loss of membership*) and only the statutory rate of interest, 5 per cent., can thenceforward be charged to C. D. on the balance remaining due said association after applying all credits, including the withdrawal value of said stock on the day last mentioned.

That no share of the capital stock aforesaid has matured or reached the par value of One Hundred Dollars.

That there is due, owing and payable to said association from said C. D. on account of the bond and trust deed aforesaid and on account of the foregoing the sum of \$ as appears from the following items of debits and credits.

Debits.

(Date of resolution)	Principal loan	\$
" "	5 Int. Installments in arrears	.....
" "	5 Premium Installments in arrears	.....
" "	Fines assessed as afore- said	.....
	Taxes	.....
	Insurance	.....

Credits.

Dues paid\$.....
Int. according to
by-laws\$.....

Balance due \$

(Date of resolution) Balance due \$

Interest thereon at 5 per cent. to (date of report.)

Also the further sum of \$200 as and for complainant's solicitors, etc., etc. (See plan of ordinary foreclosure report.)

NOTE: Building and Loan Association foreclosure bills are seldom correctly drawn. The plan of the master's report above stated will serve to point out what allegations the bill should contain.

89.

NOTICE OF DRAFT OF REPORT.

(Title of Court and cause.)

To, solicitor for complainant, and solicitor for defendant:

Please take notice that I have prepared a draft of my report in the above-entitled cause, and objections thereto may be filed at my office on or before, the day of, A. D. 19, which will be the last day for filing objections to the same; and that I shall hear argument on any objections filed on, A. D. 19, at o'clock M., at which time and place you may appear if you see fit.

Dated,,, 19

.

Master in Chancery of the court of County,
State of

90. BRIEF SUGGESTING FINDINGS FOR MASTER'S REPORT.

(Title of court and cause.)

Before

Master in Chancery

Brief of

Solicitor for

"On behalf of, complainant (or defendant) in the above entitled cause, we respectfully contend that the pleadings, proceedings, orders of record, exhibits and evidence, in the above entitled cause, will justify said master in including in his report, among other findings of fact, the following:

"1. That (*here state finding of fact substantially as alleged in the pleading, and after the finding, cite all the exhibits or pages containing evidence pro and con on the finding.*)

"2. That, etc.

"We further respectfully contend that upon the facts as aforesaid the master should find the following conclusions of law:

“1. That, etc. (*State finding of law and cite authorities.*)

“Dated this day of

.....
(Signed) “Solicitors for Complainant.
(Or Defendant.)”

91. OBJECTIONS AND EXCEPTIONS TO THE MASTER’S
RULING UPON TESTIMONY, BEFORE THE
MASTER FILES HIS REPORT.

State of, }
County of } ss.

In the court.
..... term, A. D. 19....

A. B. }
v. }
C. D. }

In Chancery.
Gen. No.

OBJECTIONS AND EXCEPTIONS TO THE MASTER’S RULING
UPON EVIDENCE.

And now comes, defendant (or complainant) in the above-entitled cause, and brings before this court the following objections and exceptions upon the following testimony and evidence had and taken before master in chancery,, to whom this cause stands referred.

(1) Test. page 26: (Mr. Williams examining W. F. Brown, for complainant.)

Q. State in substance the terms of this contract.

Mr. R.: On behalf of the defendant,, I object, upon the ground that this contract, being in writing, the writing itself is the best evidence of its terms.

The Master: Let him answer.

Mr. R.: Exception.

(2) Test. page 39: Mr. Williams examining Mrs. Alice Temple, for complainant.)

Q. Did he acquiesce in your proposition?

Mr. R.: I object on behalf of defendant,, upon the ground that the question asks for a conclusion. The best evidence is either the contract in writing or the actual language used in such parts of the contract as were oral.

The Master: Let her answer.

Mr. R.: Exception.

(3) Etc.

Wherefore, said, defendant in the above-entitled cause, prays the court to consider said objections and exceptions upon the evidence, and to enter an order stating what

objections and exceptions, as made on behalf of said defendant, are allowed, and what objections and exceptions are overruled, and directing the master to proceed to take such further testimony as this court may deem proper, and directing the master to disregard, in making up his report, such testimony as this court may rule to be incompetent or irrelevant, and this defendant prays for such further orders and directions as this court may deem proper to make.

Dated this day of, 19....

(Signed)

..... Solicitor.

92. OBJECTIONS TO MASTER'S REPORT.

State of, }
County of } ss.

In the court.

In Chancery.

Gen. No.

A. }
v. }
B. }

"Now comes, complainant (or defendant), and objects to the master's (first) draft of his report in the above entitled cause, dated the day of

"1. Because the master on page of his report has found that (*state the finding of fact.*)

"Whereas, said master should have found from the pleadings and evidence that (*state the finding of fact as objector thinks it should be found*).

"One ground of objection, among others, being that (said master's finding is contrary to the weight of evidence and contrary to confessions under the pleading; or state other objection). We respectfully call the master's attention to the following, being all the pages of evidence, for the master's finding, viz.: pages 27, 31: and to the following, being all the pages in favor of the finding above requester for us, viz. pages 42, 47, 49.

"2. Also because the master has omitted to find, anywhere in his report, that (*here state the finding of fact which was omitted by the master, and which the party objecting deems it essential to his suit, for the master to have found*). The ground of objection, among others, being that (the finding is material to complainant's case and is justified by the pleadings and the evidence). See testimony pp. 17, 24.

"3. Etc.

"Wherefore, said objector prays the master to modify and amend the said draft of his report in accordance with the ob-

jections above stated, and in accordance with the pleadings, proceedings, orders of record, and exhibits and evidence introduced.

“Dated this day of
 (Signed) “
 “Solicitor for Complainant
 (or Defendant).”

93. EXCEPTIONS TO MASTER'S REPORT.

(*Title of court and cause.*)

And now comes, and in open court makes and takes the following objections and exceptions to the report of, master in chancery, to whom this cause stands referred by an order heretofore made herein; which report is dated the day of, A. D. 19...., and was filed of record herein on the day of, 19....

(1) For that the master, on page of his said report, has found that (*here insert the finding and ground of exception*), whereas he should have found from the evidence and pleadings, that (*here state finding which should have been made*).

See evidence pages 16, 27, 89.

(2) For that, etc.

Wherefore, said, excepts to said report, and appeals to the judgment of the court, and prays the court, upon consideration thereof, to enter an order stating what exceptions are allowed and what exceptions are overruled, and either in said order making findings or conclusions other than or additional to those contained in the report, or by said order referring the report back to said master directing him to file a new and amended report and to make the certain other or additional findings or conclusions specified by the court in such order, together with such further findings and conclusions as may be consistent with those specified in the order, and consistent with the rulings of the court upon exceptions ruled on by the court, and containing such other directions as may be equitable.

Dated this day of, 19....

C. D., Defendant.

G. F., Solicitor for Defendant, C. D.

94. ORDER CONFIRMING MASTER'S REPORT.

(*Title of court and cause.*)

This cause coming on this day to be heard on the report of, one of the masters in chancery of this court, to whom the above-entitled cause was duly referred, which said report was filed in this court on the day of, A. D.

19...., and upon the exceptions of the defendant, C. D., to said report, and the complainant being present in open court by G. H., his solicitor, and the defendant being present in open court by J. E., his solicitor, and the court having heard the arguments of the solicitors for the respective parties in support of and against the allowance of said exceptions and the confirmation of the said report, and having considered the same, and being fully advised in the premises,

It is ordered that the said exceptions, and each of them, be and the same are hereby overruled, and that the said report of the said master be and the same is in all things approved and confirmed.

95. DECREE IN FORECLOSURE CASE. (CONTAINING
ORDER CONFIRMING MASTER'S REPORT.)

State of }
County of } ss.

In the Court. In Chancery.

Gen. No.

A. B. }
v. }
C. D. }

This day came the complainant by, solicitor, and the defendant And this cause coming on now to be heard upon the bill of complaint of heretofore taken as confessed by and against the defendant (name of defendant's defaulted) the answer of the defendant the answer of the defendant by guardian *ad litem*, and the complainant's replication to said answer, and upon the report filed herein on the day of 19...., and dated 19...., of, the master in chancery to whom this cause was, by order of this court, heretofore referred to take proofs herein and report the same to this court, with his conclusions of fact and of law upon the evidence; and upon proofs and exhibits herein made in open court On motion of complainant's solicitor, it is ordered that said master's report be, and the same is hereby in all things approved and confirmed, including his fees and charges, which are hereby allowed as certified by the master, and taxed as costs herein.

And the court, being fully advised in the premises, finds that the material allegations in said bill of complaint have been proved as in said bill set forth, and are true, except as otherwise found by this decree, that the equities of this cause are with the complainant, and that there was and is due to said complainant (name), from (names) the sum of (\$.....) dollars, being the amount found

due by said master's report, as more fully appears from the following items: (*State items*), together with interest at five per cent per annum on said total sum from the date of said master's report. Also the further sum of dollars, as and for complainant's solicitor's fees herein

And the court further finds (*state 1. findings of fact; 2. findings of law.*) Include findings as to jurisdiction over defendants and as to which defendants, if any, are personally liable to pay said sums.

It is therefore ordered, adjudged and decreed that unless the defendant, or some of the defendants, within two days from the date of the entry of this decree, pay or cause to be paid to said complainant said sum of dollars and cents, with interest on \$ (being said total less the said sum for solicitor's fees) at the rate of five per centum per annum from the date of said master's report to the day of such payment, and pay to the officers of this court the taxed costs in this cause; that the premises hereinafter and in said bill of complaint described, or so much thereof as may be necessary to pay the amount so found to be due the complainant with interest thereon, and the costs aforesaid, and which may be sold separately without material injury to the parties in interest, be sold at public vendue to the highest and best bidder for cash by, a master in chancery of this court, at street, in the city of, in the county and state aforesaid; that said master give public notice of the time and place and terms of such sale, by publishing same at least once in each week for three successive weeks in some secular newspaper of general circulation, published in the of, county of and state of, and that the complainant, or any of the parties to this cause, may become the purchaser at such sale; that upon such sale being made, said master execute and deliver to the purchaser or purchasers a certificate or certificates of sale, evidencing such purchase, describing the premises purchased, the amount paid therefor, or if purchased by the complainant, the amount of bid, and the time when such purchaser or purchasers will be entitled to a deed for said premises, if the same shall not be redeemed according to law, and that within ten days from such sale he file a duplicate of such certificate or certificates in the office of the recorder of said county.

That said master, out of the proceeds of said sale, retain his fees, disbursements and commissions according to law, and pay to the officers of this court their costs in this cause, including \$. hereby taxed as costs for said master's reasonable fees and charges under the order of reference herein, and out of the remainder pay to the complainant the amount by this decree found to be due with interest thereon at the

rate of five (5) per cent per annum from the date of said master's report to the date of such sale; and if such remainder shall not be sufficient to pay said amount and interest, that he apply the same to the extent to which it may reach in satisfaction thereof, and specify the amount of the deficiency in his report of such sale; and if said remainder shall be more than sufficient to pay said amount and interest, that he hold the surplus subject to the further order of this court; and that he take receipt from the respective parties to whom he may have made payments as aforesaid, and file the same with his report of said sale in this court.

It is further ordered, adjudged and decreed, that upon the expiration of the statutory periods of redemption after the date of such sale, if the premises so sold shall not be redeemed according to law, the defendants and all persons claiming under them, or any of them, since the commencement of this suit, be forever barred and foreclosed of and from all right and equity of redemption or claim of, in and to said premises or any part thereof; and in case said premises shall not be redeemed as aforesaid, then upon the production to the master, or his successor, of the said certificate or certificates of sale by the legal holder thereof, said master shall make, execute and deliver to the legal holder of such certificate or certificates a good and sufficient deed of conveyance of said premises; and that thereupon the grantee or grantees in such deed, or his or their legal representatives or assigns, be let into possession of said premises; and that any of the parties to this cause who shall be in possession of said premises or any portion thereof, or any person who may have come into such possession under them, or any of them, since the commencement of this suit, upon the production of said master's deed of conveyance, and a certified copy of the order of court confirming said sale, surrender possession of said premises to said grantee or grantees, his or their representatives or assigns.

The premises by this decree authorized to be sold are situated in the of county of and state of and described as follows, to-wit:

Examined and approved by me this day of
..... 190..

.....
Master in Chancery of said Court.

Enter

.....
Judge.

96. MEMORANDUM OF TIME AND PLACE OF SALE AND OF
CASH REQUIRED OF COMPLAINANT IF HE BIDS.

Sale, at 11 o'clock A. M., at street.
State of, }
County of } ss.
In the Court. In Chancery.

Gen. No.

T. No.

..... }
v. }
..... }

DECREE, INTEREST AND COSTS OF SALE.

Decree Debt	\$
Interest thereon at 5% from date of master's report to date of sale	\$
Solicitor's fee	\$
Taxed costs (including Master's report, \$.....)	\$
Master's fees, disbursements and commissions:	
Preparing notice of sale	\$
Publishing notice of sale	\$
Commissions on sale	\$
Certificate and duplicate of sale	\$
Recording duplicate certificate	\$
Report of sale and distribution	\$

Total, \$

Cash at sale for master if bid in by complainant:

Report \$
Expenses and commissions.. \$

\$

97. MASTER'S REPORT OF SALE AND DISTRIBUTION.

(Title of court and cause.)

Foreclosure

To the honorable judges of said court, in chancery sitting:

Pursuant to a decree entered in the above entitled cause on the
..... day of, A. D. 19.., I,, a master in
chancery of said court, respectfully report that more than
days having elapsed after the entry of said decree, and said de-
fendant not having paid the whole or any part of the money by
said decree required to be by him paid, I duly advertised, accord-
ing to the law and to said decree, the premises in said decree and
hereinafter described, to be sold at public auction to the highest

and best bidder therefor, for cash, at the hour of 11 o'clock in the forenoon of, the day of A. D. at, on the ground floor of the building known as No., in the city of in said county, by causing a notice containing the title of said cause, the names of the parties thereto, the name of the court wherein said cause was pending, and a description of the premises to be sold, and a statement of the aforesaid time, place and terms of said sale, to be published for three successive weeks immediately prior to said day of sale, to-wit: three times in, a public secular newspaper, of general circulation, printed and published every day, in the city of, in said county. The day of the first paper containing said notice was the day of, A. D., and the date of the last paper containing said notice was the day of, A. D.; a certificate of which publication is hereto attached, Marked Exhibit A.

At the time and place so designated by said advertisement for said sale, I attended to make said sale; and I offered said premises for sale at public auction to the highest and best bidder for cash. I first offered each lot of said premises for sale separately, and there were no bids upon said offer. I next offered any number of said lots less than the whole of said premises for sale in groups to suit bidders, and there were no bids upon said last-named offer. I then offered said premises for sale entire; whereupon offered and bid therefor the sum of dollars (\$.....), and that being the highest and best bid for cash therefor offered, I struck off and sold to said bidder for said sum of money the said premises which are situated in the county of, and state of, and described as follows, to-wit: (*Describe premises.*)

The amount aforesaid realized from the sale aforesaid. I have allowed, distributed, credited, paid and retained as follows:

(Allowed complainants (towards or in full of amount due on decree (\$.....) and interest thereon (\$.....) ...\$	
(Allowed) complainant in full of taxed costs.....\$	
(Allowed) complainant in full of solicitor's fees.....\$	
Retained by master for advertising sale.....\$	
Retained by master for publishing notice of sale.....\$	
Retained by master for commissions on sale.....\$	
Retained by master for certificate of sale and duplicate..\$	
Retained by master for recording duplicate certificate..\$	
Retained by master for report of sale.....\$	

The receipts for said payments are hereto attached as a part of this report and marked "Exhibits B, C, and D."

I have executed and delivered to purchaser at said sale, the certificate of sale directed by said decree, and by law,

to be executed, and have filed in the office of the recorder of deeds of said county the duplicate of said certificate.

In conclusion, I report that the proceeds of said sale were sufficient to pay the amount found to be due to said complainant

All of which is respectfully submitted.

Dated this day of, 19..

Master in Chancery of the Court of County,
.....

98. MASTER'S RECEIPTS FOR MONEYS.

(*Title of court and cause.*)

Exhibit B.

....., 19..
Received of master in chancery of said court dollars,
on account of amount due under decree herein, together with in-
terest thereon.

.....
.....

Exhibit C.

....., 19..
Received of master in chancery of said court dollars,
for solicitor's fees, due under decree herein.

.....
.....

Exhibit D.

....., 19..
Received of master in chancery of said court dollars,
on account of complainant's taxed costs herein.

.....
.....

99. ORDER CONFIRMING SALE AND DEFICIENCY DECREE.

(*Title of court and cause.*)

And now again come said complainants, by said,
their solicitor, and this cause comes on to be further heard upon
the report of sale by, master in chancery, filed herein
on the day of, A. D. 19.., and thereupon,
on motion of said complainant's solicitor, it is ordered and de-
creed that said report and sale, be, and hereby is fully approved
and confirmed.

And it appearing to the court from said report that the said
master has, as required by said decree, retained out of the pro-
ceeds of such sale his fees, disbursements and commissions on
said sale, amounting to dollars (\$.....), and paid
to complainants their costs in this suit, amounting to
dollars (\$.....), and their solicitor's fees, amounting to

..... dollars (\$.....), and filed their receipts therefor with his report, and that after deducting dollars (\$.....), the amount so retained and paid out, there remained to be applied upon the amount due to said complainant under said decree, the sum of dollars (\$.....); and the said master producing the receipt of the said complainant, for said last-named sum, it is ordered that the same be, and it is, credited on said decree as paid to said complainant on said day of, A. D. 19..

And it further appearing to the court, from said report, that the proceeds of said sale were insufficient to pay the amount adjudged to be due to said complainant, and that there is a balance due to said complainant over and above such proceeds of sale, of the sum of dollars (\$.....); now, therefore, it is ordered, adjudged and decreed by the court that the said complainant have and recover of and from the said defendants, and upon whom personal service was had in this cause, and who are personally liable for the payment of said debt, the said last-mentioned sum of dollars (\$.....), and that the complainant have execution therefor, as upon a judgment at common law.

100.

MASTER'S CERTIFICATE OF SALE.

(*Title of court and cause.*)

I,, master in chancery of the court of county,, do hereby certify, that pursuant to a decree entered on the day of A. D. 19.., by the said court in the above entitled cause, I duly advertised, according to law, the premises hereinafter described, to be sold at public vendue, to the highest and best bidder for cash, at the hour of o'clock in the forenoon, on the day of, A. D., 19.., at No. street, in the city of, in said county. That at the time and place so aforesaid appointed for said sale, I attended to make the same, and offered and exposed said premises for sale at public vendue, to the highest and best bidder for cash: Whereupon offered and bid therefor the sum of; and that being the highest and best bid offered therefor I accordingly struck off and sold to said bidder, for said sum of money, the said premises, which are situated in the county of and state of, and are described as follows, to-wit:

And I do further certify that the said legal representatives or assigns, will be entitled to a deed of said premises on the day of A. D. 19.., unless the same shall be redeemed according to law.

Witness my hand and seal, this day of
A. D. 19..

.....[SEAL.]
Master in Chancery of the Court of County,
State of

101. MASTER'S CERTIFICATE OF REDEMPTION.

Whereas, the following described premises, situated in the county of and state of, were on the day of, A. D. 19.., exposed for sale at public vendue by the undersigned, one of the masters in chancery of the court of county, in pursuance of a decree made and entered by the court of county, on the day of A. D. 19.., in a certain cause then pending therein on the chancery side thereof, in which defendant

And, whereas, at said time, being the highest and best bidder.. therefor, became the purchaser.., for the sum of of said premises, to-wit:, and received from the undersigned a certificate of such sale, stating the said purchaser would be entitled to a deed of said premises on the day of, A. D. 19.., unless sooner redeemed.

And, whereas, twelve months have not elapsed since said sale,

And, whereas,, being interested in said premises has this day paid to the undersigned, as master in chancery, the sum of, being the amount of said sale with interest thereon, and the further sum of for taxes and assessments paid by the holder of said certificate of sale on said premises, with interest thereon as and for the redemption of said premises from said sale.

Now, therefore, the undersigned hereby certifies that said premises have been this day redeemed from said sale by in accordance with the provisions of the statute in such case made and provided.

Given under my hand and seal this day of,
A. D. 19..

.....[SEAL.]
Master in Chancery of the Court of
County.

102. MASTER'S DEED.

This indenture, made this day of, A. D. 19.., between, master in chancery of the court of county, in the state of, party of the first part, and of county of and state of party of the second part, witnesseth:

Whereas, in pursuance of a decree entered on the day

of, A. D. 19.., by the court of said county, in a certain case then pending therein, on the chancery side thereof, wherein, complainant., and, defendant., the said master in chancery duly advertised, according to law, the premises hereinafter described, for sale at public auction to the highest bidder, at the hour of o'clock, in the noon, on the day of, A. D. 19.., at in in said county.

And, whereas, at the time and place so as aforesaid appointed for said sale, the said master in chancery attended to make the same, and offered and exposed said premises for sale at public auction, to the highest bidder, and thereupon offered and bid therefor the sum of dollars (\$.....); and that being the highest bid offered said master in chancery accordingly struck off and sold to said for said sum of money, the said premises, and did thereupon sign, seal and deliver to said the usual master's certificate therefor:

And, whereas, said premises have not been redeemed from said sale:

Now, therefore, in consideration of the premises the said party of the first part doth hereby convey unto the said party of the second part heirs and assigns, the said premises, which are situated in county of and state of, and described as follows, to-wit:

To have and to hold the same, with all the appurtenances thereunto belonging, unto the said party of the second part, heirs and assigns, forever.

Witness the hand and seal of the said party of the first part, the day and year first above written.

..... [SEAL.]
Master in Chancery of the Court of County.
State of, }
County of } ss.

I, a notary public in and for the said in the state aforesaid, do hereby certify that, master in chancery of the court of said county, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that he signed, sealed and delivered the said instrument as his free and voluntary act, as such master in chancery, for the uses and purposes therein set forth.

Given under my hand and notarial seal, this day of, A. D. 190 .

.....
Notary Public.

103. MASTER'S REPORT IN PARTITION SUIT.

(Title of court and cause.)

To the honorable judges of said court, in chancery sitting:

Pursuant to an order of reference heretofore entered herein, said Master reports as follows:

That, upon due notice to all the parties hereto, and in due form of law, parties were present, witnesses were duly sworn and testified, evidence was heard and received, and proceedings were had, as more fully appears from the transcript of proceedings and evidence annexed as a part of this report; which said transcript, together with the exhibits therein mentioned, contains all the evidence submitted before the master in said cause; and from the competent evidence so submitted, and from the confessions under the pleadings in said cause, said master finds the following matters of fact to be true:

That—

That—etc. etc.

(If the partition bill prays only for general relief master should make following recommendations as a guide for the court's next order).

Said master therefore recommends that the court appoint three commissioners, not connected with any of the parties herein, either by consanguinity or affinity, and entirely disinterested, to make partition of said premises above described; that such commissioners each take and subscribe an oath or affirmation fairly and impartially to make partition of said premises, according to the rights and interests of the parties herein, as found above by said master and as may be declared by the judgment of the court, if the same can be done consistently with the interests of the parties; or, if the same cannot be so divided without manifest prejudice to the parties in interest, that such commissioners will fairly and impartially appraise the value of each piece of the premises aforesaid, and a true report make to said court.

Said master further recommends that such commissioners shall go upon said premises, and if the same are susceptible of division they shall make partition thereof, allotting the several shares to the respective parties entitled thereto as aforesaid, quality and quantity considered according to their respective rights and interests, as may be adjudged by said court, designating the respective shares by metes and bounds, or other proper description, and that such commissioners may be permitted to employ a surveyor, with necessary assistants, to aid therein; and if the premises aforesaid are not susceptible of division without manifest prejudice to said parties in interest, they shall value each piece separately.

Said master further recommends that such commissioners

make report in writing, signed by at least two of them, showing what they have done, and, if they shall have made a division, describing the premises divided and the shares of each party by metes and bounds, or other proper description; or, if they find that said premises cannot be divided, they shall so report, and shall report their valuation of each piece separately.

Said master further recommends that if the whole or any of the premises aforesaid sought to be partitioned cannot be divided without manifest prejudice to the said owners thereof, and the commissioners appointed to divide the same shall so report, the court shall order the premises so not being susceptible of division to be sold at public vendue, upon such terms and notice of sale as the court shall direct, for not less than two-thirds of the total amount of the valuation of such premises so not susceptible of division.

All of which recommendations are in accordance with the provisions of the statute in such case made and provided.

All of which is respectfully submitted this day of

Master in Chancery of the Court of County,

104.

MASTER'S REPORT OF PARTITION SALE.

(Title of court and cause.)

REPORT OF PARTITION SALE BY MASTER IN CHANCERY.
To the honorable judges of said court, in chancery sitting:

Pursuant to a decree made and entered by said court in the above entitled cause on the 9th day of July, A. D. 1900, I,, master in chancery of said court, respectfully report that, in accordance with said decree, I duly advertised the premises in said decree and hereinafter described to be sold at public auction to the highest and best bidder for cash, and upon the terms and conditions set forth in said decree, at, No. street, in the city of, county of, and state of, at the hour of eleven o'clock in the forenoon, on, the day of, A. D. 19.., by causing a notice containing the title of said cause, the names of the parties thereto, the name of the court in which said cause was pending, a description of the premises to be sold, and a statement of the aforesaid time, place, terms and conditions of sale, to be published for three successive weeks prior to said sale in the "....." a secular newspaper of general circulation in said county, published in said county every day except Sunday, the date of the first publication thereof being the day of, A. D. 19..; the date of the second publication thereof, being the day of, A. D.

19...; and the date of the third publication thereof being the day of, A. D. 19...; a certificate of which publication is hereto attached as a part of this report and is marked "Exhibit A."

At the time and place designated as aforesaid for said sale, I attended to make the same, and offered said premises for sale at public auction to the highest and best bidders for cash therefor, and upon the terms and conditions set forth in said decree. And I first offered each of said lots for sale separately and singly, making note of each amount offered for each single lot; and the sum total of the several bids upon said last-named offer by said master was not sufficient to realize and fulfill the amount and terms set forth in said decree. I then offered the lots of said premises for sale singly and in groups to suit bidders; whereupon, offered and bid the sum of (\$.....) for lot in block of said premises; offered and bid the sum of dollars (\$.....) for lot in block, of said premises; etc. And the total of said last mentioned bids amounted to \$.....

I next offered said premises for sale in any groups or combinations of lots less than the whole of said premises, and there were no bids upon said last-named offer, except the bids as set forth as aforesaid. I next offered said premises for sale entire, and there were no bids upon said last-named offer. And the bids above specified being the highest and best bids offered for said premises, I struck off and sold to said, for said sum of hundred (\$.....), lot in block in (etc.).

And I also struck off and sold to said for said sum of \$....., lot (etc.).

And said master further reports that said purchasers have paid said master the amounts of their respective bids, conditional, however, upon the confirmation by this honorable court of said master's report of sale herein, and upon receiving from said master their respective and proper deeds of conveyance of the premises respectively so sold to them as aforesaid; which said deeds of conveyance shall be in accordance with the terms and conditions set forth in said decree.

All of which is respectfully submitted, this day of, A. D.

Master in Chancery of the Court of County,
.....

105. ORDER CONFIRMING MASTER'S REPORT OF PARTITION SALE AND DIRECTING DISTRIBUTION.

(Title of court and cause.)

The report of, master in chancery, appointed by a former decree of the court herein to make sale and to carry into effect said former decree and make report of his proceedings, having been filed in this court on the day of, A. D. 19. . ., and no objections having been filed thereto up to this date, and the court, having examined said report, doth find that the said master has in every respect proceeded in due form of law and in accordance with the terms of said decree, and that said sale was fairly made; and the court, being fully advised in the premises, doth *order, adjudge and decree* that the proceedings, sale and report of said master be and the same are hereby approved and confirmed; and it is further ordered that the said master execute and deliver to the said purchaser at said sale, a proper deed of conveyance of the premises so sold; and that out of the proceeds of said sale said master retain his commissions and fees as follows:

Report upon the issues	\$
Preparing notice of sale	
Publishing notice of sale	
Salesroom fee, imposed by decree	
Commissions on sale	
Report of sale	
Report of distribution	
Deed	
<hr/>	
Total	

and said master shall distribute the residue of said moneys between said parties as follows:

To complainant's solicitor the sum of	\$
To the three commissioners heretofore appointed herein each the sum of \$10.00	30.00
To complainant, for sums advanced for taxed costs	
To on account of her dower interest in said premises	
To, on account of her 2/80 interest in and to the premises sold	
To said, on account of her 39/80 interest in and to the premises sold	
To said, on account of her 39/80 interest in and to the premises sold	

Said master is directed to take and file with his report the receipts for said payments.

Dated this day of, 19..

.....
Judge.

106. MASTER'S REPORT OF DISTRIBUTION IN
PARTITION SUIT.

(*Title of court and cause.*)

REPORT OF DISTRIBUTION,, MASTER IN CHANCERY.

To the honorable judges of said court, in chancery sitting:

Pursuant to a further order entered in the above entitled cause on the day of, 19.., whereby the master's report of sale filed in this court on the day of 19.., was approved and confirmed and by which order said master was directed to execute and deliver to, the purchaser at said sale, a proper deed of conveyance of said premises, and by which order, also, said master was ordered to make distribution of the proceeds of said sale and take receipts therefor, said master reports as follows:

That the amount paid by said for the premises was dollars (\$.....), which said sum said master has distributed as follows:

Retained by master as commissions and fees:

Report upon the issues.....	\$
Preparing notice of sale.....	
Publishing notice of sale.....	
Salesroom fee imposed by decree....	
Commissions on sale.....	
Report of sale.....	
Report of distribution.....	
Deed	

—————\$

Paid Commissioners' fees.....	
Paid complainant, for sums advanced for taxed costs.....	\$
Paid and delivered to on account of her dower in said premises.....	\$
Paid and delivered to on account of her 2/80 interest in the premises sold.....	\$
Paid to on account of her 39/80 interest in the premises sold.....	\$
Paid to on account of her 39/80 interest in the premises sold.....	\$
Total	\$

The receipts for said payments are hereto attached as a part of this report, and are marked, respectively, Exhibit A, B, C, D, E, F and G.

Said master reports that he has executed and delivered to purchaser at said sale a proper deed of conveyance of said premises.

All of which is respectfully submitted this day of, 19..

Master in Chancery of the Court.

107. RESTRAINING ORDER PENDING APPLICATION FOR INJUNCTION.

(Title of court, and of cause.)

Whereas, in the above cause, a motion for the issuance of a preliminary writ of injunction has been duly filed, the hearing thereof being fixed for the day of, 19..; and it having been made to appear that there is danger of irreparable injury being caused to complainant, before the hearing of said application for the writ of injunction, unless the said defendants are, pending such hearing, restrained as herein set forth, therefore complainant's application for such restraining order is granted (*if security is required, then add*, upon his giving good security in the sum of, for making good to the defendants the damages and costs that may be awarded them by reason of the granting of this order):

Now, therefore, take notice that you, and, defendants herein, your agents, servants and attorneys, and each of you, are hereby specially restrained and enjoined from (here insert the act or acts sought to be restrained), until the hearing upon said application for a writ of injunction and the further order of the court in the premises.

.....,
Judge.

108. ORDER GRANTING PRELIMINARY INJUNCTION.

(Title of court, and of cause.)

Whereas, in the above entitled cause, an application for the issuance of a preliminary writ of injunction was duly filed and set down for hearing before the court (or, before the Honorable G. H., a judge of said court) on the day of, 19.., at, notice of such application being given to and, defendants herein; and the parties now appearing by their solicitors and being heard upon such application, and it appearing that cause exists for the granting a writ of injunction, pending the final hearing of the cause, as prayed for:

It is therefore ordered that upon the complainant giving security, by bond, in the sum of, conditioned that (here insert the proper conditions), a writ of injunction issue commanding, restraining and enjoining the defendants, their agents, servants and attorneys, from (*here set forth the special matter sought to be enjoined*), until the further order of the court in the premises.

109.

WRIT OF PRELIMINARY INJUNCTION.

(*Title of court, and of cause.*)

The President of the United States, to and:

Whereas, in the above entitled cause, now pending in said United States District Court in and for the district of, upon application duly made to the court (or if the judge, so state, giving his name), it was on the day of, 19.., ordered that a preliminary writ of injunction issue therein as prayed for in the bill of complaint herein filed and as directed in said order:

Now, therefore, know ye, that you, and, your agents, servants and attorneys, and each of them, are hereby strictly restrained and enjoined from (here set forth clearly the act or acts sought to be enjoined), and you and each of you are hereby commanded that you do desist and refrain from doing or causing to be done all or any of the acts and things hereinabove recited and set forth, until the further order of the court in the premises.

Witness the Honorable, chief justice of the Supreme Court of the United States, this day of, and the seal of said District Court in and for the district of

., Clerk.

110.

ORDER OF CONSOLIDATION.

(*Title of court and of both causes to be consolidated.*)

The above-entitled causes coming on this day to be heard on the motion of, solicitor for, defendant in each of the above entitled causes, and the complainants in each of said causes being present in open court by, their solicitor, and the court being fully advised in the premises, it is ordered that the above-entitled causes be and they are hereby consolidated into one cause in this court, and that all separate proceedings in each of the above-entitled causes, save the first of said causes, be stayed, and that all future orders and proceedings in any of said causes be taken as in the first of said above-entitled causes.

111. ORDER TO PAY MONEY INTO COURT.

(Title of court and cause.)

On reading the bill and answer in this cause (and upon due proof of service of notice of this motion), and on motion of J. E., solicitor for complainant, and on hearing E. F. in opposition to said motion (or, no one appearing to oppose),

It is ordered that the defendant, C. D., do, on or before the day of, A. D., next, pay into the hands of the clerk of this court, in trust in this cause, the sum of dollars, admitted by the answer of the said defendant to be due from him, and that when such money is paid it be deposited by said clerk in trust in bank, to the credit of this cause, there to remain until the further order of this court.

112. PRAECIPE FOR SETTING DOWN CAUSE FOR ARGUMENT OR HEARING.

(Title of court and cause.)

To Clerk of said Court:

In above cause set down for argument demurrer (or, plea) filed to the bill.

Set down above cause for argument on defendant's objection for want of parties.

Set down above cause for hearing on bill and answer.

Set down above cause for hearing on pleadings and proofs.

113. STIPULATION.

(Title of court and cause.)

It is hereby stipulated by and between the complainant in the above-entitled cause, by, his solicitor, and the defendant in said cause, by, his solicitor, that, etc. (Here insert the matter of the stipulation; as, for example, that such cause may be referred to, one of the masters in chancery of this court, to take testimony and report the same to the court, together with his conclusions of fact and of law thereon, with all convenient speed.)

Dated,, 19...

A. B., Complainant,
By, His Solicitor.
C. D., Defendant,
By, His Solicitor.

114. WRIT OF NE EXEAT.

(Title of court, and of cause.)

The President of the United States, to, the United States marshal in and for district of

Whereas in the above entitled cause in equity now pending

in the United States District Court in and for the district of, it has been made to appear by satisfactory proof to the said court (*or*, to the district justice or judge) that, defendant in said cause, is equitably indebted to the complainant, and that the said, defendant, designs quickly to depart from the United States, and thereby defeat the remedy sought by complainant and greatly to prejudice the rights of said complainant:

Therefore you are hereby ordered and commanded that without delay you cause the said to give good and sufficient bail or security in the sum of dollars, to be by you approved, that he will not depart beyond the limits of the United States without leave of this court first had; and in case said, defendant, fails to give bail or security as aforesaid, you are commanded to keep him in custody until the further order of court or until he gives the bail or security above required.

Witness the Honorable, chief justice of the Supreme Court of the United States, this day of, 19..., and the seal of said District Court in and for the district of

....., Clerk.

115.

WRIT OF SEQUESTRATION.

(*Title of court, and of cause.*)

The President of the United States, to

Whereas, in the above entitled cause in equity, pending in the United States District Court in and for the district of, it was, on the day of, ordered and decreed that, defendant, should (*here briefly state requirements of the order or decree*). And it now appearing that the said, defendant, has wholly failed to obey and perform such order and decree, and that for such failure a writ of attachment has been hitherto duly issued from the clerk's office of this court for the attachment of the person of said defendant, but that said writ has been returned by the marshal of this district unserved for the reason that said defendant cannot be found within the jurisdiction of this court, and that for cause shown a writ of sequestration has been ordered to issue for the seizure of the estate of said, defendant, for the purpose of compelling obedience on his part to said order and decree hereinbefore mentioned:

Now, therefore, know ye that, having confidence in your prudence and fidelity, you are hereby authorized, empowered and commanded to seize and take possession of (*here describe the estate, or portion of it, to be seized, as the real and personal estate of said within, or certain realty or*

personalty), and the rents and profits of said realty to collect and receive, and possession of said personalty to take and keep until the further order of the court in the premises.

Witness the Honorable, chief justice of the Supreme Court of the United States, this day of, with the seal of said United States District Court in and for district of

116.

WRIT OF ASSISTANCE.

(Title of court, and of cause.)

The President of the United States, to, marshal of the district of, Greeting:

Whereas in the above entitled cause it has been made to appear to the said United States District Court in and for the district of, that under the decree of said court heretofore rendered in the above case, and the proceedings had for the enforcement thereof, the said, complainant as aforesaid (*or*, H. B., the purchaser at the foreclosure sale, or whoever the party entitled to the writ may be), is now entitled to be put in possession of the following realty (describing it), or to have delivered up to him the following described personal property:

Now, therefore, you, as United States marshal for said district of, are hereby directed and commanded that you forthwith put the said into possession of the real estate above described (*or*, cause to be delivered to said the personal property above described), and that you cause the defendants in the above suit, their agents, servants and attorneys, to forthwith yield possession of said property in obedience to the decree heretofore entered in this case. Hereof fail not.

Witness the Honorable, chief justice of the Supreme Court of the United States, this day of, 19... with the seal of said United States District Court in and for the district of

., Clerk.

117.

BILL OF REVIVOR.

(Title of court and of cause.)

To, the Judges of said Court:

. herein avers and shows to this honorable court that since the beginning of this suit (here insert event that has caused the abatement and necessity of reviving the cause, as the death of party, and set forth who are the representatives, heirs or others against whom it is sought to revive).

Wherefore, by reason of the premises, this suit has become stayed or abated; and to revive, continue and further proceed

therewith it has become necessary to make said and parties hereto, to which end prays and moves the court to enter all proper orders as to notice to the parties to be substituted, and for reviving and continuing said cause and substituting said and said as parties (complainant or defendant) and for the filing of such pleadings or amendments as may be necessary.

118. BILL OF REVIEW ON GROUND OF NEW MATTER.

(*Title of court and of cause.*)

..... }
 .. } Bill of review on behalf of
 .. }

To the Judges of said Court:

Petitioner avers and shows that in a certain suit entitled as above, and brought in this court to the term, 19.., thereof, this petitioner was defendant (*or*, complainant) therein, and that at the term, 19.., of said court, upon a hearing therein, a final decree therein was entered in said cause greatly to the prejudice and injury of this petitioner, which said decree is entered at large upon the records of this court and to which reference is prayed.

And this petitioner avers and says that lately and since the entry of said final decree aforesaid he hath discovered that (here set forth the new matter or the new evidence relied on as ground of review, with proper averments to show its materiality, and also show that the party was not in fault in not adducing such matter at the hearing).

Wherefore, for said causes alleged, said decree should be reviewed, reversed and set aside; and to the end that petitioner may be permitted to show and prove the matters aforesaid, petitioner prays process by subpoena against, requiring him to appear hereto and due answer make, and that upon the hearing hereof the said decree may be reviewed, reversed and set aside, and such other and further orders and decree be made as may to the court seem proper.

United States of America, }
 District of }

I,, being duly sworn, do say that I am petitioner in the foregoing bill of review, that I have read the same, and that the matters and things therein set forth are true.

Subscribed and sworn to before me this day of, 19..

119. BILL OF REVIEW FOR ERRORS ON FACE OF RECORD.

(Title of court and of cause.)

..... }
 .. } Bill of review on behalf of
 }

To the Judges of said Court:

Petitioner respectfully avers that in a certain suit entitled as above, and brought in this court to the term, 19.., thereof, this petitioner was defendant (*or*, complainant) therein, and that at the term, 19.., of said court, upon a hearing therein, a final decree was entered in said cause greatly to the prejudice and injury of your petitioner, which said decree is entered at large upon the records of this court, and to which reference is prayed. And petitioner avers and says that said decree so entered is upon the face of the record erroneous for that (*here set forth the particular matters in which error is alleged, and show how such alleged errors prejudice petitioner.*)

Wherefore, as said errors appear on the face of the record, and are greatly prejudicial to petitioner and his rights in the premises, petitioner prays that said decree may be reviewed, reversed and set aside. And to that end petitioner prays process by subpoena against, requiring him to appear and answer hereto and show cause, if he may, why said decree should not be reviewed and set aside, and such further orders and decrees be made as to the court may seem just.

120. JUDGE'S CERTIFICATE OF EVIDENCE HEARD
IN OPEN COURT.*(Title of court and of cause.)*

Be it remembered, and certified that on the hearing of this cause, at the above term of court, upon the bill of complaint, answer to said bill, and the replication thereto, the following proceedings and evidence were had and taken:

C. D., a witness produced on the part of complainant, was sworn and testified as follows:

(Here insert his testimony including stenographer's affidavit, as follows):

And the complainant further offered in evidence *one trust deed* marked for identification, as complainant's exhibit 1, and *four promissory notes* marked for identification as complainant's exhibits 2, 3, 4, 5, in words and figures as follows: (*Here copies.*)

And further, E. F., a witness on the part of the defendant, was sworn and testified as follows: (*Here insert his testimony in full also verified by stenographer's affidavit.*)

And further the defendant offered in evidence a certain *deed*

marked for identification as defendant's exhibit 1, in words and figures, as follows, to-wit: (*Here insert copy.*)

Be it further remembered, and certified, that the foregoing were all the proceedings and evidence had and taken on the hearing of said cause.

And, inasmuch as the matters above set forth do not fully appear of record in said cause, the tenders this certificate of the proceedings and evidence, and prays that the same may be certified under the hand and seal of the judge of this court, and thereby made a part of the record in said cause, and it is accordingly certified and made a part of the record of said cause.

Dated this, A. D. 19...

.....
Judge.

State of, }
County of..... } ss.

I,, do hereby certify that I am a shorthand reporter and that the above and foregoing is a true and correct transcript of all the evidence taken by me in shorthand upon the examination of witnesses in open court, and of the proceedings had upon the hearing of this cause.

Dated this day of, A. D. 19..

Subscribed and sworn to before me, this day of, A. D. 19..

.....
Notary Public.

121. PETITION FOR APPEAL.

(*Title of court, of cause, and address to judges.*)

Your petitioner, the in the above entitled cause, would respectfully represent and show that in the above entitled case pending in the United States District Court in and for the district of, there was entered at the term, 19.., of said court, a final decree greatly to the prejudice and injury of your petitioner, which said decree is erroneous and inequitable in many particulars.

Wherefore, in order that your petitioner may obtain relief in the premises and have opportunity to show the errors complained, your petitioner prays that he may be allowed an appeal in said case to the court, and that the proper orders touching the security required of him may be made.

122. CITATION UPON APPEAL.

(*Title of court and of cause.*)

United States of America, to:

You are hereby notified that in a certain case in equity in

the United States District Court in and for the district of, wherein is complainant and and are defendants, an appeal has been allowed, the therein to the and you are hereby cited and admonished to be and appear in said court at, days after the date of this citation, to show cause, if any there be, why the order and decree appealed from should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable, judge of, this day of, A. D. 19...

.....
Judge of

THE NEW RULES OF PRACTICE
FOR THE
COURTS OF EQUITY
OF THE UNITED STATES

PROMULGATED BY THE
SUPREME COURT OF THE UNITED STATES
NOVEMBER 4, 1912
In Force February 1, 1913

FEDERAL EQUITY RULES

Rule 1. District court always open for certain purposes—

Orders at chambers. The district courts, as courts of equity, shall be deemed always open for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules and other proceedings preparatory to the hearing, upon their merits, of all causes pending therein.

Any district judge may, upon reasonable notice to the parties, make, direct, and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court.

Rule 2. Clerk's office always open, except, etc. The clerk's office shall be open during business hours on all days, except Sundays and legal holidays, and the clerk shall be in attendance for the purpose of receiving and disposing of all motions, rules, orders and other proceedings which are grantable of course.

Rule 3. Books kept by clerk and entries therein. The clerk shall keep a book known as "Equity Docket," in which he shall enter each suit, with a file number corresponding to the folio in the book. All papers and orders filed with the clerk in the suit, all process issued and returns made thereon, and all appearances shall be noted briefly and chronologically in this book on the folio assigned to the suit and shall be marked with its file number.

The clerk shall also keep a book entitled "Order Book," in which shall be entered at length, in the order of their making,

all orders made or passed by him as of course and also all orders made or passed by the judge in chambers.

He shall also keep an "Equity Journal," in which shall be entered all orders, decrees and proceedings of the court in equity causes in term time.

Separate and suitable indices of the Equity Docket, Order Book and Equity Journal shall be kept by the clerk under the direction of the court.

Rule 4. Notice of orders. Neither the noting of an order in the Equity Docket nor its entry in the Order Book shall of itself be deemed notice to the parties or their solicitors; and when an order is made without prior notice to, and in the absence of, a party, the clerk, unless otherwise directed by the court or judge, shall forthwith send a copy thereof, by mail, to such party or his solicitor and a note of such mailing shall be made in the Equity Docket, which shall be taken as sufficient proof of due notice of the order.

Rule 5. Motions grantable of course by clerk. All motions and applications in the clerk's office for the issuing of mesne process or final process to enforce and execute decrees; for taking bills *pro confesso*; and for other proceedings in the clerk's office which do not require any allowance or order of the court or of a judge, shall be deemed motions and applications grantable of course by the clerk; but the same may be suspended, or altered, or rescinded by the judge upon special cause shown.

Rule 6. Motion day. Each district court shall establish regular times and places, not less than once each month, when motions requiring notice and hearing may be made and disposed of; but the judge may at any time and place, and on such notice, if any, as he may consider reasonable, make and direct all interlocutory orders, rulings and proceedings for the advancement, conduct and hearing of causes. If the public interest permits, the senior circuit judge of the circuit may dispense with the motion day during not to exceed two months in the year in any district.

Rule 7. Process, mesne and final. The process of subpoena shall constitute the proper mesne process in all suits in equity,

in the first instance, to require the defendant to appear and answer the bill; and, unless otherwise provided in these rules or specially ordered by the court, a writ of attachment and, if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

Rule 8. Enforcement of final decrees. Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the district court in suits at common law in actions of *assumpsit*. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court, or a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found a writ of sequestration shall issue against his estate, upon the return of *non est inventus*, to compel obedience to the decree. If a mandatory order, injunction or decree for the specific performance of any act or contract be not complied with, the court or a judge, besides, or instead of, proceedings against the disobedient party for a contempt or by sequestration, may by order direct that the act required to be done, be done, so far as practicable, by some other person appointed by the court or judge, at the cost of the disobedient party, and the act, when so done, shall have like effect as if done by him.

Rule 9. Writ of assistance. When any decree or order is for the delivery of possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party

prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

Rule 10. Decree for deficiency in foreclosures, etc. In suits for the foreclosure of mortgages, or the enforcement of other liens, a decree may be rendered for any balance that may be found due to the plaintiff over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in rule 8 when the decree is solely for the payment of money.

Rule 11. Process in behalf of and against persons not parties. Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, may enforce obedience to such order by the same process as if he were a party; and every person, not being a party, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such orders as if he were a party.

Rule 12. Issue of subpœna—Time for answer. Whenever a bill is filed, and not before, the clerk shall issue the process of subpœna thereon, as of course, upon the application of the plaintiff, which shall contain the names of the parties and be returnable into the clerk's office twenty days from the issuing thereof. At the bottom of the subpœna shall be placed a memorandum, that the defendant is required to file his answer or other defense in the clerk's office on or before the twentieth day after service, excluding the day thereof; otherwise the bill may be taken *pro confesso*. Where there are more than one defendant, a writ of subpœna may, at the election of the plaintiff, be sued out separately for each defendant, or a joint subpœna against all the defendants.

Rule 13. Manner of serving subpœna. The service of all subpœnas shall be by delivering a copy thereof to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member of or resident in the family.

Rule 14. Alias subpœna. Whenever any subpœna shall be returned not executed as to any defendant, the plaintiff shall

be entitled to other subpoenas against such defendant, until due service is made.

Rule 15. Process, by whom served. The service of all process, mesne and final, shall be by the marshal of the district or his deputy, or by some other person specially appointed by the court or judge for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof.

Rule 16. Defendant to answer—Default—Decree pro confesso. It shall be the duty of the defendant, unless the time shall be enlarged, for cause shown, by a judge of the court, to file his answer or other defense to the bill in the clerk's office within the time named in the subpoena as required by rule 12. In default thereof the plaintiff may, at his election, take an order as of course that the bill be taken *pro confesso*; and thereupon the cause shall be proceeded in *ex parte*.

Rule 17. Decree pro confesso to be followed by final decree—Setting aside Default. When the bill is taken *pro confesso* the court may proceed to a final decree at any time after the expiration of thirty days after the entry of the order *pro confesso*, and such decree shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit. No such motion shall be granted, unless upon the payment of the costs of the plaintiff up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.

Rule 18. Pleadings—Techincal forms abrogated. Unless otherwise prescribed by statute or these rules the technical forms of pleadings in equity are abolished.

Rule 19. Amendments generally. The court may at any time, in furtherance of justice, upon such terms as may be just, permit any process, proceeding, pleading or record to be amended, or material supplemental matter to be set forth in an amended or supplemental pleading. The court, at every stage of the

proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Rule 20. Further and Particular statement in pleading may be required. A further and better statement of the nature of the claim or defense, or further and better particulars of any matter stated in any pleading, may in any case be ordered, upon such terms, as to costs and otherwise, as may be just.

Rule 21. Scandal and impertinence. The right to except to bills, answers, and other proceedings for scandal or impertinence shall not obtain, but the court may, upon motion or its own initiative, order any redundant, impertinent or scandalous matter stricken out, upon such terms as the court shall think fit.

Rule 22. Action at law erroneously begun as suit in equity—Transfer. If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential.

Rule 23. Matters ordinarily determinable at law, when arising in suit in equity to be disposed of therein. If in a suit in equity a matter ordinarily determinable at law arises, such matter shall be determined in that suit according to the principles applicable, without sending the case or question to the law side of the court.

Rule 24. Signature of counsel. Every bill or other pleading shall be signed individually by one or more solicitors of record, and such signatures shall be considered as a certificate by each solicitor that he has read the pleading so signed by him; that upon the instructions laid before him regarding the case there is good ground for the same; that no scandalous matter is inserted in the pleading; and that it is not interposed for delay.

Rule 25. Bill of complaint—Contents. Hereafter it shall be sufficient that a bill in equity shall contain, in addition to the usual caption:

First, the full name, when known, of each plaintiff and defendant, and the citizenship and residence of each party. If any party be under any disability that fact shall be stated.

Second, a short and plain statement of the grounds upon which the court's jurisdiction depends.

Third, a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence.

Fourth, if there are persons other than those named as defendants who appear to be proper parties, the bill should state why they are not made parties—as that they are not within the jurisdiction of the court, or cannot be made parties without ousting the jurisdiction.

Fifth, a statement of and prayer for any special relief pending the suit or on final hearing, which may be stated and sought in alternative forms. If special relief pending the suit be desired the bill should be verified by the oath of the plaintiff, or someone having knowledge of the facts upon which such relief is asked.

Rule 26. Joinder of causes of action. The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant. But when there are more than one plaintiff, the causes of action joined must be joint, and if there be more than one defendant the liability must be one asserted against all of the material defendants, or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice. If it appear that any such causes of action cannot be conveniently disposed of together, the court may order separate trials.

Rule 27. Stockholder's Bill. Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of

the shareholders, and the causes of his failure to obtain such action, or the reasons for not making such effort.

Rule 28. Amendment of bill as of course. The plaintiff may, as of course, amend his bill before the defendant has responded thereto, but if such amendment be filed after any copy has issued from the clerk's office, the plaintiff at his own cost shall furnish to the solicitor of record of each opposing party a copy of the bill as amended, unless otherwise ordered by the court or judge.

After pleading filed by any defendant, plaintiff may amend only by consent of the defendant or leave of the court or judge.

Rule 29. Defenses—How presented. Demurrers and pleas are abolished. Every defense in point of law arising upon the face of the bill, whether for misjoinder, nonjoinder, or insufficiency of fact to constitute a valid cause of action in equity, which might heretofore have been made by demurrer or plea, shall be made by motion to dismiss or in the answer; and every such point of law going to the whole or a material part of the cause or causes of action stated in the bill may be called up and disposed of before final hearing at the discretion of the court. Every defense heretofore presentable by plea in bar or abatement shall be made in the answer and may be separately heard and disposed of before the trial of the principal case in the discretion of the court. If the defendant move to dismiss the bill or any part thereof, the motion may be set down for hearing by either party upon five days' notice, and, if it be denied, answer shall be filed within five days thereafter or a decree *pro confesso* entered.

Rule 30. Answer—Contents—Counterclaim. The defendant in his answer shall in short and simple terms set out his defense to each claim asserted by the bill, omitting any mere statement of evidence and avoiding any general denial of the averments of the bill, but specifically admitting or denying or explaining the facts upon which the plaintiff relies, unless the defendant is without knowledge, in which case he shall so state, such statement operating as a denial. Averments other than of value or amount of damage, if not denied, shall be deemed confessed, except as against an infant, lunatic or other person *non compos*

and not under guardianship, but the answer may be amended, by leave of the court or judge, upon reasonable notice, so as to put any averment in issue, when justice requires it. The answer may state as many defenses, in the alternative, regardless of consistency, as the defendant deems essential to his defense.

The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject matter of the suit, and may, without cross-bill, set out any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross-claims.

Rule 31. Reply—When required—When cause at issue. Unless the answer assert a set-off or counterclaim, no reply shall be required without special order of the court or judge, but the cause shall be deemed at issue upon the filing of the answer, and any new or affirmative matter therein shall be deemed to be denied by the plaintiff. If the answer include a set-off or counterclaim the party against whom it is asserted shall reply within ten days after the filing of the answer, unless a longer time be allowed by the court or judge. If the counterclaim is one which affects the rights of other defendants they or their solicitors shall be served with a copy of the same within ten days from the filing thereof, and ten days shall be accorded to such defendants for filing a reply. In default of a reply, a decree *pro confesso* on the counterclaim may be entered as in default of an answer to the bill.

Rule 32. Answer to amended bill. In every case where an amendment to the bill shall be made after answer filed, the defendant shall put in a new or supplemental answer within ten days after that on which the amendment or amended bill is filed, unless the time is enlarged or it is otherwise ordered by a judge of the court; and upon a default, the like proceedings may be had as upon an omission to put in an answer.

Rule 33. Testing sufficiency of defense. Exceptions for insufficiency of an answer are abolished. But if an answer set

up an affirmative defense, set-off or counterclaim, the plaintiff may, upon five days' notice, or such further time as the court may allow, test the sufficiency of the same by motion to strike out. If found insufficient but amendable the court may allow an amendment upon terms, or strike out the matter.

Rule 34. Supplemental pleading. Upon application of either party the court or judge may, upon reasonable notice and such terms as are just, permit him to file and serve a supplemental pleading, alleging material facts occurring after his former pleading, or of which he was ignorant when it was made, including the judgment or decree of a competent court rendered after the commencement of a suit determining the matters in controversy or a part thereof.

Rule 35. Bills of revivor and supplemental bills—Form. It shall not be necessary in any bill of revivor or supplemental bill to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.

Rule 36. Officers before whom pleadings verified. Every pleading which is required to be sworn to by statute, or these rules, may be verified before any justice or judge of any court of the United States, or of any State or Territory, or of the District of Columbia, or any clerk of any court of the United States or of any Territory, or of the District of Columbia, or any notary public.

Rule 37. Parties generally—Intervention. Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought. All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff. Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause. Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when

any one refuses to join, he may for such reason be made a defendant.

Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding.

Rule 38. Representatives of class. When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.

Rule 39. Absence of persons who would be proper parties. In all cases where it shall appear to the court that persons, who might otherwise be deemed proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in its discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

Rule 40. Nominal parties. Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpoena upon him, need not appear and answer the bill, unless the plaintiff specially requires him to do so by the prayer; but he may appear and answer at his option; and if he does not appear and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct.

Rule 41. Suit to execute trusts of will—Heir as party. In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiff shall be at liberty to make the heir at law a party where he desires to have the will established against him.

Rule 42. Joint and several demands. In all cases in which the plaintiff has a joint and several demand against several

persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

Rule 43. Defect of parties—Resisting objection. Where the defendant shall by his answer suggest that the bill of complaint is defective for want of parties, the plaintiff may, within fourteen days after answer filed, set down the cause for argument as a motion upon that objection only; and where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order to amend his bill by adding parties; but the court shall be at liberty to dismiss the bill, or to allow an amendment on such terms as justice may require.

Rule 44. Defect of parties—Tardy objection. If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having by motion or answer taken the objection and therein specified by name or description the parties to whom the objection applies, the court shall be at liberty to make a decree saving the rights of the absent parties.

Rule 45. Death of party—Revivor. In the event of the death of either party the court may, in a proper case, upon motion, order the suit to be revived by the substitution of the proper parties. If the successors or representatives of the deceased party fail to make such application within a reasonable time, then any other party may, on motion, apply for such relief, and the court, upon any such motion, may make the necessary orders for notice to the parties to be substituted and for the filing of such pleadings or amendments as may be necessary.

Rule 46. Trial—Testimony usually taken in open court—Rulings on objections to evidence. In all trials in equity the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute or these rules. The court shall pass upon the admissibility of all evidence offered as in actions at law. When evidence is offered and excluded, and the party against whom the ruling is made excepts thereto

at the time, the court shall take and report so much thereof, or make such a statement respecting it, as will clearly show the character of the evidence, the form in which it was offered, the objection made, the ruling, and the exception. If the appellate court shall be of opinion that the evidence should have been admitted, it shall not reverse the decree unless it be clearly of opinion that material prejudice will result from an affirmance, in which event it shall direct such further steps as justice may require.

Rule 47. Depositions—To be taken in exceptional instances. The court, upon application of either party, when allowed by statute, or for good and exceptional cause for departing from the general rule, to be shown by affidavit, may permit the deposition of named witnesses, to be used before the court or upon a reference to a master, to be taken before an examiner or other named officer, upon the notice and terms specified in the order. All depositions taken under a statute, or under any such order of the court, shall be taken and filed as follows, unless otherwise ordered by the court or judge for good cause shown: Those of the plaintiff within sixty days from the time the cause is at issue; those of the defendant within thirty days from the expiration of the time for the filing of plaintiff's depositions; and rebutting depositions by either party within twenty days after the time for taking original depositions expires.

Rule 48. Testimony of expert witnesses in patent and trade-mark cases. In a case involving the validity or scope of a patent or trade-mark, the district court may, upon petition, order that the testimony in chief of expert witnesses, whose testimony is directed to matters of opinion, be set forth in affidavits and filed as follows: Those of the plaintiff within forty days after the cause is at issue; those of the defendant within twenty days after plaintiff's time has expired; and rebutting affidavits within fifteen days after the expiration of the time for filing original affidavits. Should the opposite party desire the production of any affiant for cross-examination, the court or judge shall, on motion, direct that said cross-examination and any re-examination take place before the court upon the trial, and unless the affiant is produced and sub-

mits to cross-examination in compliance with such direction, his affidavit shall not be used as evidence in the cause.

Rule 49. Evidence taken before examiners, etc. All evidence offered before an examiner or like officer, together with any objections, shall be saved and returned into the court. Depositions, whether upon oral examination before an examiner or like officer or otherwise, shall be taken upon questions and answers reduced to writing, or in the form of narrative, and the witness shall be subject to cross and re-examination.

Rule 50. Stenographer—Appointment—Fees. When deemed necessary by the court or officer taking testimony, a stenographer may be appointed who shall take down testimony in shorthand, and, if required, transcribe the same. His fee shall be fixed by the court and taxed ultimately as costs. The expense of taking a deposition, or the cost of a transcript, shall be advanced by the party calling the witness or ordering the transcript.

Rule 51. Evidence taken before examiners, etc. Objection to the evidence, before an examiner or like officer, shall be in short form, stating the grounds of objection relied upon, but no transcript filed by such officer shall include argument or debate. The testimony of each witness, after being reduced to writing, shall be read over to or by him, and shall be signed by him in the presence of the officer; provided, that if the witness shall refuse to sign his deposition so taken, the officer shall sign the same, stating upon the record the reasons, if any, assigned by the witness for such refusal. Objection to any question or questions shall be noted by the officer upon the deposition, but he shall not have power to decide on the competency or materiality or relevancy of the questions. The court shall have power, and it shall be its duty, to deal with the costs of incompetent and immaterial or irrelevant depositions, or parts of them, as may be just.

Rule 52. Attendance of witnesses before commissioner, master or examiner. Witnesses who live within the district, and whose testimony may be taken out of court by these rules, may be summoned to appear before a commissioner appointed to take testimony, or before a master or examiner appointed in any

cause by subpoena in the usual form, which may be issued by the clerk in blank and filled up by the party praying the same, or by the commissioner, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear or give evidence it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon by order of the court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in, the court.

In case of refusal of witnesses to attend or be sworn or to answer any question put by the commissioner, master or examiner or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

Rule 53. Notice of taking testimony before examiner, etc. Notice shall be given by the respective counsel or parties to the opposite counsel or parties of the time and place of examination before an examiner or like officer for such reasonable time as the court or officer may fix by order in each case.

Rule 54. Deposition under rev. stat. §§ 863, 865, 866, 867,—Cross-examination. After a cause is at issue, depositions may be taken as provided by sections 863, 865, 866 and 867, Revised Statutes. But if in any case no notice has been given the opposite party of the time and place of taking the deposition, he shall, upon application and notice, be entitled to have the witness examined orally before the court, or to a cross examination before an examiner or like officer, or a new deposition taken with notice, as the court or judge under all the circumstances shall order.

Rule 55. Deposition deemed published when filed. Upon the filing of any deposition or affidavit taken under these rules or any statute, it shall be deemed published, unless otherwise ordered by the court.

Rule 56. On expiration of time for depositions, case goes on trial calendar. After the time has elapsed for taking and filing depositions under these rules, the case shall be placed on the trial calendar. Thereafter no further testimony by deposition shall be taken except for some strong reason shown by affidavit. In every such application the reason why the testimony of the witness cannot be had orally on the trial, and why his deposition has not been before taken, shall be set forth, together with the testimony which it is expected the witness will give.

Rule 57. Continuances. After a cause shall be placed on the trial calendar it may be passed over to another day of the same term, by consent of counsel or order of the court, but shall not be continued beyond the term save in exceptional cases by order of the court upon good cause shown by affidavit and upon such terms as the court shall in its discretion impose. Continuances beyond the term by consent of the parties shall be allowed on condition only that a stipulation be signed by counsel for all the parties and that all costs incurred theretofore be paid. Thereupon an order shall be entered dropping the case from the trial calendar, subject to reinstatement within one year upon application to the court by either party, in which event it shall be heard at the earliest convenient day. If not so reinstated within the year, the suit shall be dismissed without prejudice to a new one.

Rule 58. Discovery—Interrogatories—Inspection and production of documents—Admission of execution or genuineness. The plaintiff at any time after filing the bill and not later than twenty-one days after the joinder of issue, and the defendant at any time after filing his answer and not later than twenty-one days after the joinder of issue, and either party at any time thereafter by leave of the court or judge, may file interrogatories in writing for the discovery by the opposite party or parties of facts and documents material to the support or defense of the cause, with a note at the foot thereof stating which of the interrogatories each of the parties is required to answer. But no party shall file more than one set of interrogatories to the same party without leave of the court or judge.

If any party to the cause is a public or private corporation,

any opposite party may apply to the court or judge for an order allowing him to file interrogatories to be answered by any officer of the corporation, and an order may be made accordingly for the examination of such officer as may appear to be proper upon such interrogatories as the court or judge shall think fit.

Copies shall be filed for the use of the interrogated party and shall be sent by the clerk to the respective solicitors of record, or to the last known address of the opposite party if there be no record solicitor.

Interrogatories shall be answered, and the answers filed in the clerk's office, within fifteen days after they have been served, unless the time be enlarged by the court or judge. Each interrogatory shall be answered separately and fully and the answers shall be in writing, under oath, and signed by the party or corporate officer interrogated. Within ten days after the service of interrogatories, objections to them, or any of them, may be presented to the court or judge, with proof of notice of the purpose so to do, and answers shall be deferred until the objections are determined, which shall be at as early a time as is practicable. In so far as the objections are sustained, answers shall not be required.

The court or judge, upon motion and reasonable notice, may make all such orders as may be appropriate to enforce answers to interrogatories or to effect the inspection or production of documents in the possession of either party and containing evidence material to the cause of action or defense of his adversary. Any party failing or refusing to comply with such an order shall be liable to attachment, and shall also be liable, if a plaintiff, to have his bill dismissed, and, if a defendant, to have his answer stricken out and be placed in the same situation as if he had failed to answer.

By a demand served ten days before the trial, either party may call on the other to admit in writing the execution or genuineness of any document, letter or other writing, saving all just exceptions; and if such admission be not made within five days after such service, the costs of proving the document, letter or writing shall be paid by the party refusing or neglecting to make such admission, unless at the trial the court shall find that the refusal or neglect was reasonable.

Rule 59. Reference to master—Exceptional, not usual. Save in matters of account, a reference to a master shall be the exception, not the rule, and shall be made only upon a showing that some exceptional condition requires it. When such a reference is made, the party at whose instance or for whose benefit it is made shall cause the order of reference to be presented to the master for a hearing within twenty days succeeding the time when the reference was made, unless a longer time be specially granted by the court or judge; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.

Rule 60. Proceedings before master. Upon every such reference, it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties, or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed *ex parte*, or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings and to make his report, and to certify to the court or judge the reason for any delay.

Rule 61. Master's report—Documents identified but not set forth. In the reports made by the master to the court, no part of any state of facts, account, charge, affidavit, deposition, examination, or answer brought in or used before him shall be stated or recited. But such state of facts, account, charge, affidavit, deposition, examination, or answer shall be identified, and referred to, so as to inform the court what state of facts, account, charge, affidavit, deposition, examination, or answer were so brought in or used.

Rule 62. Powers of master. The master shall regulate all the proceedings in every hearing before him, upon every ref-

erence; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath, *viva voce*, all witnesses produced by the parties before him, or by deposition, according to the acts of Congress, or otherwise, as here provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.

Rule 63. Form of accounts before master. All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the account so brought in shall be at liberty to examine the accounting party *viva voce*, or upon interrogatories, as the master shall direct.

Rule 64. Former deposition, etc., may be used before master. All affidavits, depositions and documents which have been previously made, read, or used in the court upon any proceeding in any cause or matter may be used before the master.

Rule 65. Claimants before master examinable by him. The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or *viva voce*, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examinations shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court if necessary.

Rule 66. Return of master's report—Exceptions—Hearing. The master, as soon as his report is ready, shall return the same into the clerk's office and the day of the return shall be entered by the clerk in the Equity Docket. The parties shall have twenty days from the time of the filing of the report to file

exceptions thereto, and if no exceptions are within that period filed by either party, the report shall stand confirmed. If exceptions are filed, they shall stand for hearing before the court, if then in session, or, if not, at the next sitting held thereafter, by adjournment or otherwise.

Rule 67. Costs on exceptions to master's report. In order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled, shall, for every exception overruled, pay five dollars costs to the other party, and for every exception allowed shall be entitled to the same costs.

Rule 68. Appointment and compensation of masters. The district courts may appoint standing masters in chancery in their respective districts (a majority of all the judges thereof concurring in the appointment), and they may also appoint a master *pro hac vice* in any particular case. The compensation to be allowed to every master shall be fixed by the district court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

Rule 69. Petition for rehearing. Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or by some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Circuit Court of Appeals or the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.

Rule 70. Suits by or against incompetents. Guardians *ad litem* to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable of suing for themselves. All infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami*; subject, however, to such orders as the court or judge may direct for the protection of infants and other persons.

Rule 71. Form of decree. In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz:—" (Here insert the decree or order.)

Rule 72. Correction of clerical mistakes in orders and decrees. Clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may, at any time before the close of the term at which final decree is rendered, be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a rehearing.

Rule 73. Preliminary injunctions and temporary restraining orders. No preliminary injunction shall be granted without notice to the opposite party. Nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall clearly appear from specific facts, shown by affidavit or by the verified bill, that immediate and irreparable loss or damage will result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency specified, the matter shall be made returnable at the earliest possible time, and in no event later than ten days from the date of the order, and shall take precedence of all matters, except older matters of the same character. When the matter comes up for

hearing the party who obtained the temporary restraining order shall proceed with his application for a preliminary injunction, and if he does not do so the court shall dissolve his temporary restraining order. Upon two days' notice to the party obtaining such temporary restraining order, the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require. Every temporary restraining order shall be forthwith filed in the clerk's office.

Rule 74. Injunction pending appeal. When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or a judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending, modifying or restoring the injunction during the pendency of the appeal, upon such terms, as to bond or otherwise, as he may consider proper for the security of the rights of the opposite party.

Rule 75. Record on appeal—Reduction and preparation.
In case of appeal:

(a) It shall be the duty of the appellant or his solicitor to file with the clerk of the court from which the appeal is prosecuted, together with proof or acknowledgment of service of a copy on the appellee or his solicitor, a *præcipe* which shall indicate the portions of the record to be incorporated into the transcript on such appeal. Should the appellee or his solicitor desire additional portions of the record incorporated into the transcript, he shall file with the clerk of the court his *præcipe* also within ten days thereafter, unless the time shall be enlarged by the court or a judge thereof, indicating such additional portions of the record desired by him.

(b) The evidence to be included in the record shall not be set forth in full, but shall be stated in simple and condensed form, all parts not essential to the decision of the questions presented by the appeal being omitted and the testimony of witnesses being stated only in narrative form, save that if either party desires it, and the court or judge so directs, any part of the testimony shall be reproduced in the exact words

of the witness. The duty of so condensing and stating the evidence shall rest primarily on the appellant, who shall prepare his statement thereof and lodge the same in the clerk's office for the examination of the other parties at or before the time of filing his *præcipe* under paragraph *a* of this rule. He shall also notify the other parties or their solicitors of such lodgment and shall name a time and place when he will ask the court or judge to approve the statement, the time so named to be at least ten days after such notice. At the expiration of the time named or such further time as the court or judge may allow, the statement, together with any objections made or amendments proposed by any party, shall be presented to the court or the judge, and if the statement be true, complete and properly prepared, it shall be approved by the court or judge, and if it be not true, complete or properly prepared, it shall be made so under the directions of the court or judge and shall then be approved. When approved, it shall be filed in the clerk's office and become a part of the record for the purposes of the appeal.

(c) If any difference arise between the parties concerning directions as to the general contents of the record to be prepared on the appeal, such difference shall be submitted to the court or judge in conformity with the provisions of paragraph *b* of this rule and shall be covered by the directions which the court or judge may give on the subject.

Rule 76. Record on appeal—Reduction and preparation—Costs—Correction of omissions. In preparing the transcript on an appeal, especial care shall be taken to avoid the inclusion of more than one copy of the same paper and to exclude the formal and immaterial parts of all exhibits, documents and other papers included therein; and for any infraction of this or any kindred rule the appellate court may withhold or impose costs as the circumstances of the case and the discouragement of like infractions in the future may require. Costs for such an infraction may be imposed upon offending solicitors as well as parties.

If, in the transcript, anything material to either party be omitted by accident or error, the appellate court, on a proper

suggestion or its own motion, may direct that the omission be corrected by a supplemental transcript.

Rule 77. Record on appeal—Agreed statement. When the questions presented by an appeal can be determined by the appellate court without an examination of all the pleadings and evidence, the parties, with the approval of the district court or the judge thereof, may prepare and sign a statement of the case showing how the questions arose and were decided in the district court and setting forth so much only of the facts alleged and proved, or sought to be proved, as is essential to a decision of such questions by the appellate court. Such statement, when filed in the office of the clerk of the district court, shall be treated as superseding, for the purposes of the appeal, all parts of the record other than the decree from which the appeal is taken, and, together with such decree, shall be copied and certified to the appellate court as the record on appeal.

Rule 78. Affirmation in lieu of oath. Whenever under these rules an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.

Rule 79. Additional rules by district court. With the concurrence of a majority of the circuit judges for the circuit, the district courts may make any other and further rules and regulations for the practice, proceedings and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, and from time to time alter and amend the same.

Rule 80. Computation of time—Sundays and holidays. When the time prescribed by these rules for doing any act expires on a Sunday or legal holiday, such time shall extend to and include the next succeeding day that is not a Sunday or legal holiday.

Rule 81. These rules effective February 1, 1913—Old rules abrogated. These rules shall be in force on and after February 1, 1913, and shall govern all proceedings in cases then

pending or thereafter brought, save that where in any then pending cause an order has been made or act done which cannot be changed without doing substantial injustice, the court may give effect to such order or act to the extent necessary to avoid any such injustice.

All rules heretofore prescribed by the Supreme Court, regulating the practice in suits in equity, shall be abrogated when these rules take effect.

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